Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

COMMENTS OF ALPHEUS COMMUNICATIONS, L.P.

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I. INTRODUCTION AND SUMMARY

Of all the possible UNEs, dark fiber unbundling is the ultimate tool available to the Commission to stimulate true facilities-based competition over what has been called by some the "synthetic" competition that results from the shared use of the incumbent's switches and electronics. The preservation of dark fiber as an unbundled network element promotes the Act's fundamental purpose: creating sustainable facilities based compeition where competitors provide innovative services, different from those offered by the ILEC, using technology that spawns additional investment and innovation in the American economy.

The Commission, in the *Triennial Review Order*, unanimously determined that dark fiber should remain an unbundled network element. Building upon that determination, the Commission found that CLECs that were no longer impaired without "lit" elements, such as OCn transport or loops, would be able to deploy their own optronics and light dark fiber to replace their OCn UNEs. In addition, the Commission found that CLECs would no longer be impaired without unbundled access to DS1 and DS3 loops and transport, to the extent two or more CLECs were providing DS1 and DS3 service on a wholesale basis using dark fiber. The Commission's policy of encouraging facilities-based competition recognized that dark fiber was critical for migrating carriers from leasing ILEC lit UNEs, based on a resale of ILEC services, and for encouraging the development of a vibrant wholesale market with true alternatives to the incumbent LEC services.

USTA II does not diminish the important role dark fiber plays in the Commission's loop and transport unbundling regime. The court did not take issue with how the Commission employed UNE dark fiber in its unbundling framework, nor with the factual determinations reached in the TRO regarding the barriers to deploying fiber, nor with the triggers the

Commission developed to determine impairment. Although the court took issue with the relevant impairment standard, and the Commission's application of that standard to the market for transport, the Court implicitly recognized that many dark fiber transport routes will remain UNEs, while other dark fiber transport routes may not be available.

The Commission should take notice of the significant portions of the *TRO* that were upheld, especially in light of the Supreme Court's discussion of the Act's pro-competitive aims, and narrowly tailor any revised impairment tests to meet the threshold set by the D.C. Circuit, while remaining faithful to the competitive goals of the Act set by Congress and upheld by the Supreme Court.

Consistent with the policy of encouraging the continued development of competition in the local telecommunications market and with the contours of the Commission's unbundling authority established in the D. C. Circuit, in these comments, Alpheus proposes the following framework for unbundling dark fiber:

- Dedicated Transport Dark Fiber: the Commission should adopt a three-tier impairment test
  - Tier 1: No impairment between wire centers each having more than 40,000 business access lines
  - Tier 2: Impairment subject to TRO triggers on routes between wire centers each having 20,000-40,000 business access lines
  - Tier 3: Conclusive finding ofimpairment on routes between wire centers below 20,000 business access lines
  - ILECs Should Be Allowed To Commercially Negotiate An End To Dark Fiber UNEs by Providing Dark fiber CLECs with IRUs
- Dark Fiber Loops: The Commission should find that, in light of overwhelming evidence from the TRO cases, CLECs are impaired on a national basis, but that the Commission will apply the TRO triggers as appropriate. A more generalized geographic market approach is not feasible in light of the building access restrictions that vary widely from building to building;
- Dark Fiber: Should be considered a separate product market in the loop and transport analysis because the significant investment carriers must make in order to light dark fiber is consistent with the Act's purpose of encouraging facilities

based competition; dark fiber adds new capacity to the market instead of reselling ILEC capacity; and allows the Commission to reduce unbundling in other areas in favor of a facilities-based model;

- Two Step Transition for Dark Fiber: Because of the significant obstacles, length of time to obtain permits and rights-of-way and difficulty of deploying dark fiber, CLECs using dark fiber should have 48 months to transition to their own fiber; once a finding of non-impairment is made; but the ILEC can reduce the transition to 12 months on any route where the ILEC provides duct, "rodded, roped and ready;"
- Special Access: Importantly, because there is no special access substitute for dark fiber the existence of ILEC access tariffs is simply irrelevant;
- Qualifying Services: The Commission should make separate impairment determinations for CLEC services that compete with services traditionally provided by the incumbent LECs Impairment Standard: The Commission should re-adopt the TRO impairment standard but as it applies to a "reasonably efficient" competitor;
- Impairment Standard: The Commission should clarify that the TRO impairment test will be measured by the standard of a "reasonably efficient" competitor;
- Section 271: This section imposes an independent obligation on the RBOCs to provide dark fiber to CLECs. The RBOCs voluntarily agreed to these obligations. If they choose to now reject the federal bargain, they should likewise forfeit the benefits of interLATA service;
- Promoting Facilities Based Competition: Unbundling dark fiber is the type of facilities based competition envisioned under the Act where competitors bring some of their own facilities to the table to create innovative and advanced services that allow them to distinguish their services from that provided by the ILEC;
- Benefits of Unbundling: Unbundling access to dark fiber has many benefits, such as stimulating facilities based investment, avoiding wasteful duplication of existing dormant and legacy facilities, and creating new capacity with little costs because the ILEC receives significant incremental revenue for an asset for which it has no other use.

II. THE COMMISSION SHOULD PROMOTE FACILITIES-BASED COMPETITION

A. Keeping Dark Fiber Unbundled Fulfills the Purpose of the Act

In its unbundling orders the Commission has remained steadfast that an important policy objective of the market opening provisions of the 1996 Act is the promotion of facilities based-

competition.[1] In evaluating whether CLECs are impaired without unbundled access to dark fiber, the Commission's decision-making should remain tethered to this fundamental policy goal. While the Commission must necessarily address the specific issues vacated and remanded in *USTA II*, the court's opinion does not diminish the Commission's primary duty to implement the 1996 Act in the manner intended by Congress.

Chairman Powell has articulated the central importance of facilities based competition both from intermodal and intramodal competitors.

> "a commitment to promote and advance competition that is meaningful and sustainable, and that will eventually achieve Congress' goal of reducing regulation and promoting facilities-based competition.[2] The benefits of such a policy are straightforward:
>
> - Facilities-based competition means a competitor can offer service differentiated from the incumbent.
> - Facilities-based competitors own more of their network and can control more of their costs, thereby offering consumers real potential for lower prices.
> - Facilities-based competitors are less dependent on the incumbent thereby reducing the need for regulation – an explicit Congressional goal.
> - Facilities-based competitors also create vital redundant networks that can serve our nation if other facilities are damaged by those hostile to our way of life."[3]

As Alpheus has consistently reminded the Commission, <u>unbundling dark fiber promotes the intramodal facilities based competition</u> envisioned by the Chairman:

- By lighting dark fiber, rather than using lit UNEs, competitors can offer service differentiated from the incumbent, such as the Gigabit Ethernet and Managed Wavelength services Alpheus provides its wholesale customers in Texas.

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1 See *Triennial Review Order*, at , ¶ 5 (2003); *UNE Remand Order*, at, ¶ 7.

2 The Commission recognized in previous unbundling orders that the goal of its unbundling regime is to "promote the development of facilities-based competition." *UNE Remand Order* ¶ 7 (1999).

3 Separate Statement of Chairman Michael K. Powell, *TRO* at p. 2-3.

- UNE dark fiber based competitors own more of their network and can control more of their costs, because they own and control the "intelligence' on the network and rely on the incumbent only for the most costly and difficult element to duplicate – the legacy, unused fiber transmission facility.
- Because UNE dark fiber based competitors own the equipment that makes their network function they are less dependent on the incumbent thereby reducing the need for regulation.
- By lighting UNE dark fiber, competitors also create vital redundant networks that can serve our nation if other facilities are damaged by those hostile to our way of life.
    - By lighting dark fiber, competitors are creating new capacity – not reselling ILEC capacity.

The Commission embraced these principles in the *TRO*. The *TRO* thus explained that "competing carriers using unbundled dark fiber transport can operate more efficiently" and "offer a higher level of service because unbundled dark fiber integrates more efficiently into their networks by reducing the number of failure points and providing greater control" over products, testing, maintenance and service.[4] In order to use the ILEC's spare fiber, CLECs must invest significant capital.[5]

Similarly, carriers must invest in network operations and expertise in order to make a fiber network function reliably.[6] By deploying the equipment and operations in order to run such a network the CLEC is better able to control its network and provide service level guarantees to its customers. Similarly because the CLEC owns and controls the equipment it has the ability to innovate with new products and experiment with cutting edge technology in an effort to differentiate itself from the products and services offered by the incumbent.[7] This is particularly

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4 *TRO ¶ 383.*

5 Alpheus Decl. ¶¶ 6, 19, 23, 48, 58, 84, 90.

6 Alpheus Decl. ¶¶ 9-10, 17.

7 Alpheus Decl. ¶¶ 10, 17, 21-24

unique to dark fiber because the only portion of the network controlled by the incumbent is the un-intelligent portion of the network-the fiber. All the capacity and "life" of the network derives from the optronic equipment the carrier has deployed to "light" the dark fiber.

To illustrate, Alpheus has widely deployed DWDM in its network, allowing it to provide innovative Gigabit Ethernet and managed wavelength services to its customers that are different from anything offered by the incumbent. Further, because Alpheus has deployed state of the art equipment in its network hubs it is able to provision cross connects at an optical level, a significant advance in efficiency over the cumbersome electrical cross connects that are standard in the ILEC network.[8]

Thus the *TRO* found that unbundling dark fiber "advances the goals of the Act" because use of ILEC dormant "spare fiber avoids unnecessary digging of streets" and requires dark fiber users to make substantial investments in optronics equipment and collocation.[9]

The Act promotes unbundling as an important means of promoting such intramodal facilities based competition. As the Supreme Court found in *Verizon*, Congress intended that the 1996 Act would "uproot" traditional monopolies in order to foster "competition in the persistently monopolistic local markets, which were thought to be the root of natural monopoly in the telecommunications industry," and to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises."[10] The Supreme Court cited to one of the main proponents of the Act who noted that the purpose of the Act is to break up the BOC monopolies and make their networks available to competitors:

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8 Alpheus Decl. ¶¶ 10-12.

9 *TRO*, ¶ 383.

10 *Verizon* at 476, 488.

> This is extraordinary in the sense of telling private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out …. It is kind of almost a jump-start …. I will do everything I have to let you into my business, because we used to be a bottleneck; we used to be a monopoly; we used to control everything. Now, this legislation says you will not control much of anything. You will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network that is at least equal in type, quality, and price to the access [a] Bell operating company affords to itself.[11]

There is further evidence that the Act establishes unbundling as a principal mechanism for promoting facilities-based competition. For example, the Act explicitly requires unbundling of network elements as a precondition of BOC long distance entry. Section 271 establishes that the ILECs must unbundle network elements as a continuing condition of providing in-region, inter-LATA interexchange service.[12] For all practical purposes, the unbundling requirements in both Section 251 and Section 271 are the cornerstones of the 1996 Act's pro-competitive framework.

Accordingly, while addressing the narrower issues raised by *USTA II*, the Commission should continue to promote facilities-based competition by keeping unbundled access to dark fiber.

B. The Commission Should Continue To Encourage Development Of A Wholesale Market For Telecommunications Services By Carriers Using UNEs To Provide Wholesale Service

The *TRO* emphasized that CLEC use of UNEs to provide wholesale services was fully consistent with the language, structure and purpose of the Act.[13] The Commission specifically

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[11] *Verizon* at 488, citing 141 Cong. Rec. 15572 (1995). (Remarks of Sen. Breaux (La.) on Pub.L. 104-104 (1995)).

[12] 47 U.S.C. § 271(c)(2)(B).

[13] *See TRO* ¶¶ 101, 153; *see e.g.* 47 C.F.R. §§ 51.319(a), 51.319(d);

clarified that requesting telecommunications carriers can use UNEs to provide wholesale telecommunications services.[14] Importantly, the Commission's unbundling framework for DS1 and DS3 loops and transport relies on wholesale competition from carriers using dark fiber UNEs.[15] *USTA II* in no way diminished the validity of this determination.

The Commission's unbundling policy should recognize two important principles both of which lead to emerging competition in a wholesale market still dominated by the incumbent LECs.[16] First, not every firm in the market can or should self supply all of the inputs to its products and services. Rather, efficient markets are typically populated both by vertically integrated competitors and firms that compete simply in narrow horizontal wholesale markets. Second, competitors that rely largely on ILEC networks cannot simply transition to 100% self owned networks overnight, even though these competitors and others wish it were possible. Rather the Commission's unbundling framework must recognize the natural "progression" model of facilities based competition, where CLECs generally migrate from one end of the scale – relying on the ILEC for the entire network, to the other end of the scale where they rely on the ILEC for none.

It is a fundamental axiom that in order to have a competitive retail market, there must be a competitive wholesale market. If every firm in a retail market relies on the same supplier of critical inputs it becomes virtually impossible for the retail competitors to differentiate their products and services and innovate. This less than ideal retail competition is of course exacerbated when, as is the case with incumbent LECs, the dominant and frequently sole source of wholesale supply is also the dominant participant in the retail market. For these basic reasons

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[14] *TRO* ¶ 153.

[15] *See* 47 C.F.R. § 51.319(a)(5)(i)(B); 47 C.F.R. § 51.319 (e)(1)(ii)(A); 47 C.F.R. § 51.319 (e)(2)(i)(B)(1).

[16] Ad Hoc Users Study pp. 11-25.

the Commission should take every step possible to promote the development of facilities-based competition in both wholesale and retail markets.

Dark fiber is particularly suited to developing that wholesale market because carriers, such as Alpheus can efficiently invest in a robust network that is protocol agnostic, can support multiple carrier needs with extended reach, while using the elements of the network that are inefficient (if not impossible) to duplicate, such as the dormant fiber transmission facilities. Likewise by using UNEs to provide wholesale services, competitors enable other CLECs to reduce reliance on ILEC lit UNEs.

To understand this progression, for carriers that used dedicated DS1 and DS3 transport UNEs, the progression is not necessarily from reliance on the ILEC UNEs to deployment of the CLEC's own fiber facility. Rather, once the Commission determines that a CLEC is not impaired without access to a "lit" UNE, the migration is towards procuring dark fiber from the ILEC and lighting the fiber with the CLEC's own optronics. For CLECs, such as Alpheus, that use UNE dark fiber, to the extent there is a determination of no impairment on a route, the migration should not require trenching to construct new fiber facilities, but should be directed towards pulling CLEC owned fiber cable through existing ILEC owned or controlled duct. This permits carriers to gradually accumulate traffic and grow their networks, while also gradually migrating away from broad reliance on the ILEC network to minimal or no reliance. This progression reflects the Commission's goal of promoting facilities-based competition, as discussed herein.

III. THE BENEFITS OF UNBUNDLING DARK FIBER OUTWEIGH THE COSTS

In *USTA I* and *II*, the DC Circuit emphasized the Commission's role in balancing the benefits and cost of unbundling. In the case of dark fiber the balance is overwhelmingly tipped

towards the benefits and any harms are *de minimis*, at best. First, unbundling of dark fiber adds capacity to the market because the CLEC is lighting fiber and providing capacity over that fiber cable, not just ILEC. Second, unbundling dark fiber avoids the unnecessary duplication of constructing new fiber facilities when significant legacy fiber capacity remains dormant in the ground, fiber that has already been paid for by the ratepayers. This use is beneficial to the public and municipalities that avoid disruption of streets through trenching necessary to deploy duplicative fiber facilities. On the converse side of the equation, there are virtually no harms from unbundling dark fiber. The ILEC is compensated at a cost based rate for the fiber it has deployed; those rates represent 100% pure profit as the element otherwise lays dormant, unused by anyone.

A. The Benefits of Unbundling Dark Fiber

In fashioning new unbundling rules, the Commission should bear in mind that the benefits of unbundling outweigh any *de minimis* costs. For instance, marketplace evidence clearly establishes that access to UNEs does not deter, but rather promotes increased facilities investment by both CLECs and ILECs. As noted by the Supreme Court, the competitive industry has invested nearly $60 billion since passage of the 1996 Act.[17] In fact, the Commission has previously concluded the availability of UNEs is a necessary precondition for facilities investment.[18]

Accordingly, in fashioning new unbundling rules the Commission should conclude that a cost-benefit analysis favors unbundling.

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[17] *Verizon* at 470.

[18] *UNE Remand Order* ¶ 5 ('[T]he ability of requesting carriers to use unbundled network elements, including various combinations of unbundled network elements, is a necessary precondition to the subsequent deployment of self-provisioned network facilities.')

1. Unlike other UNEs, Dark Fiber Adds New Capacity to the Market.

As explained above, unbundling dark fiber benefits the American economy by stimulating carrier investment in optronics and other network equipment used to "light" the fiber and provide telecommunications services on the network. In addition, unbundling dark fiber brings other efficiencies to the market by creating new capacity where there was only a dormant asset. This makes dark fiber unique among the UNEs the Commission has required the ILECs to provide competitors.

2. Unbundling Brings Benefits to Consumers

UNE-based competition benefits consumers and businesses. In a study completed this year, it is estimated that because of the Commission's unbundling rules and the introduction of UNE-P, the United States has seen approximately $10 billion a year in consumer welfare gains.[19] CLECs have been able to use UNEs to provide new and improved services, and existing services at reduced prices. In turn, ILECs, in response to UNE based competition responded by employing new technologies and offering newer services despite fears that they might be introducing efficiencies that cannibalize their existing services. The threat of competition, including intramodal competition using UNEs, provides the best incentive for ILECs to invest in new networks. As CLECs have previously pointed out in the *Triennial Review Proceeding*, the ILECs' pattern of deployment of DSL capable networks perfectly illustrates that pattern. In a nutshell, ILECs ignored DSL until CLECs began to deploy it. As President Clinton's Council of Economic Advisers stated in early 1999:

> Although DSL technology has been available since the 1980s, only recently did [the ILECs] begin to offer DSL service to businesses

[19] *See* Phoenix Center Policy Bulletin No 8, *The $10 Billion Benefit of Unbundling: Consumer Surplus Gains from Competitive Pricing Innovations* (27 January 2004), available at http://www.phoenix-center.org/PolicyBulletin/PCPB8Final.pdf.

> and consumers seeking low-cost options for high-speed telecommunications. The incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from … the entry of new direct competitors attempting to use the local-competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities.[20]

Or, as stated more succinctly by James Glassman, the ILECs "kept cheaper DSL on the shelf for a decade" to protect their higher revenue services.[21] Competition from CLECs thus was pivotal in furthering investment by ILECs that would permit provision of DSL and other advanced services. If the Commission's unbundling rules reduce the competitive pressure CLECs bring to bear on the ILECs, there is every reason to believe ILECs will return to their old ways of offering dinosaur services at high prices.

Unbundling also results in greater efficiencies overall for the industry. By mandating that ILECs price their UNEs at cost-based prices (plus a reasonable profit), the Act increases ILECs' incentives to make their networks more efficient. If an ILEC has higher costs due to an old, inefficient network or poor management, under the statutory UNE pricing standard it cannot simply pass on these inefficiencies through higher charges to its competitors. Instead, the ILEC must improve the efficiency of its own network and management in order to maximize the profits it can earn through selling UNEs. Said another way, inefficiency is no longer incentivized.

Further, unbundling requirements improve the efficiency of new entrants in the market. The sharing of vital, hard-to-duplicate facilities is rooted in both the 1996 Act and principles of economic efficiency. As the Supreme Court noted, 'entrants may need to share some facilities

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[20] ALTS New Economy Analysis at 4 (citing Council of Economic Advisers, Economic Report of the President, February 1999, pp. 187-188, http://w3.access.gpo.gov/usbudget/fy2000/Pdf/erp.pdf).

[21] James Glassman, 'Best Remedy for Recession? Break Up the Bells,' http://www techcentralstation.com/NewsDesk.asp?FormMode=MainTemiinalArticles&ID=131 (December 10, 2001).

that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology).'[22]

As the Court further observed that:

> competition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements jointly necessary to provide a desired telecommunications service. Such is the reality faced by the hundreds of smaller entrants (without the resources of a large competitive carrier such as AT & T or WorldCom) seeking to gain toeholds in local-exchange markets, see FCC, Local Telephone Competition: Status as of June 30, 2001, p. 4, n. 13. (Feb. 27, 2002) (485 firms self-identified as competitive local- exchange carriers). Justice Breyer elsewhere recognizes that the Act 'does not require the new entrant and incumbent to compete in respect to' elements, the 'duplication of [which] would prove unnecessarily expensive,' *post,* at 8. It is in just this way that the Act allows for an entrant that may have to lease some 'unnecessarily expensive' elements in conjunction with building its own elements to provide a telecommunications service to consumers.[23]

The Court noted how the availability of costly-to-duplicate network elements at cost-based prices could "avoid the risk of keeping more potential entrants out," while "induc[ing] them to compete in less capital-intensive facilities."[24]

Thus, unbundling promotes efficient investment – if network elements are 'very expensive to duplicate' and the ILEC has already deployed that element, it makes economic

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[22] *Verizon* at 510 n.27.

[23] *Id.*

[24] *Verizon* at 510. In fact, Justice Breyer described the philosophy of unbundling as follows:

> [o]ne can understand the basic logic of 'unbundling' by imagining that Congress required a sole incumbent railroad providing service between City A and City B to share certain basic facilities, say, bridges, rights-of-way, or tracks, in order to avoid wasteful duplication of those hard-to-duplicate resources while facilitating competition in the *remaining* aspects of A-to-B railroad service. Indeed, one might characterize the Act's basic purpose as seeking to bring about, without inordinate waste, greater local service competition …..

Iowa Utilities Board, 525 U.S. at 416-417 (Breyer, J., concurring in part, dissenting in part).

sense for the CLEC to be able to lease that element on an unbundled basis as opposed to devoting precious, and increasingly scarce, capital to duplicating that element. As the Commission has noted, since TELRIC is a reasonable measure of the incumbent's economic cost of providing a network element it will 'encourage new entrants to make efficient decisions whether to lease or build and spur ILEC and CLEC investment.'[25] Eliminating unbundling obligations, however, will mean that the CLEC in such a situation must either duplicate inefficiently the facility or not serve the customer.

As the CLEC obtains more customers, its average cost of serving each customer will decrease and it will find it more efficient to deploy its own facilities.[26] As the Commission has noted, 'the purchase of unbundled network elements from the incumbent should serve as a transitional strategy that will provide requesting carriers with the ability to gain a sufficient volume of business to justify economical deployment of their own facilities.'[27]

B. Costs of Unbundling Dark Fiber are Minimal

The typical harms that Justice Breyer (in his *Verizon* dissent) and the D.C. Circuit has (mistakenly) associated with unbundling do not apply to unbundling dark fiber because the significant investment a CLEC must make in order to use that fiber. In other words, dark fiber does not involve the alleged "parasitic free riding" on the ILEC network. In order to use the dark fiber a CLEC must invest significant sums of capital into optronics to light the fiber, network operations and monitoring systems and other systems and personnel in order to make any use of that fiber.

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[25] *FCC Petition for Rehearing* at 9.

[26] *UNE Remand Order* at ¶ 79.

[27] *UNE Remand Order* at ¶ 52.

Stated another way, UNE dark fiber does not allow arbitrage that the court found harmful because CLECs must make significant investments in the economy to make use of unbundled dark fiber, which otherwise would remain unused.

Similarly, while the Commission erred in the *Triennial Review Order* in establishing limits on unbundling for broadband networks based in effect on the view that a cost of unbundling was a restraint on ILEC investment, there could be no such claim with respect to the remaining 'legacy' portions of the network such as the spare fiber in the ILECs' interoffice transport network has already been constructed and funded by captive rate payers while the ILECs were state sanctioned monopolies.

Further, the Supreme Court in *Verizon* confirmed that ILECs receive compensatory rates for the sale of their facilities and therefore there is no reason to believe that unbundling would prevent them from building new facilities. The Court thoroughly examined and definitively rejected the BOCs' position that provision of UNEs inhibits their, and CLECs', incentives to invest. As the Supreme Court recognized, TELRIC pricing of unbundled network elements provides ILECs with a return that reflects the risks they incur in providing wholesale facilities to their competitors.[28] While TELRIC pricing does not provide ILECs with the same monopoly rates of return they would otherwise receive (the same returns they received when building the interoffice transport network), they are fairly compensated for their investment in facilities. To

[28] TELRIC pricing also provides incentives for CLECs to build their own facilities. As the Supreme Court found, TELRIC rates inherently include inefficiency by requiring cost calculations to include the existing location of incumbent's wire centers. Local-loop elements, as well as other network elements, will not be priced at their most efficient cost and configuration due to the ILEC network structure. *Verizon* at 1650-51. Since TELRIC intrinsically includes these inefficiencies when pricing network elements, competitive carriers still will have the incentive to increase efficiency and profitability by building their own networks. TELRIC does not provide network elements at or below cost; rather, the Supreme Court found that TELRIC pricing of unbundled network elements results in CLECs receiving facilities at less favorable rates than if they were to construct their own facilities. Clearly, TELRIC pricing of unbundled network elements does not act as a disincentive but instead encourages competitive carriers to invest in and deploy their own facilities so as to achieve the most efficient cost and network configuration.

the contrary, the level of facilities investment by both ILECs and CLECs since 1996 confirms that unbundling in fact has spurred new investment, not inhibited it. And further, as it relates to dark fiber, the return is 100% profit, since it utilizes and idle asset that has already been paid for.

IV. CLECS ARE IMPAIRED WITHOUT ACCESS TO DEDICATED TRANSPORT

As the Commission found in the *TRO,* CLECs face significant barriers to deploying their own fiber facilities to provide dedicated transport services. Deploying fiber requires considerable investment of time and expense to deploy facilities that once in the ground are sunk costs. In addition there are numerous other barriers, including the ILEC's subsidized first mover advantages that tend to make entry into the dedicated transport market uneconomic.

As the Commission observed in the *TRO,* competitors have been able to overcome these barriers on certain routes. Because of significant cost variances from route to route, a granular route specific review remains warranted. However, as *USTA II* requires, the Commission can generalize that there is no impairment on certain routes, while recognizing that on other routes there is conclusive impairment. The allocation of impairment on these routes should be formed using proper roxies, such as (1) business access line density data which has been confirmed by Alpheus' actual experience in the field, as evidenced in Alpheus' attached declaration, (2) the analysis of TRO trigger case evidence from the state proceedings and (3) submissions from the parties including SBC and Verizon.

The impairment test proposed is as follows:

- Tier 1: No impairment between wire centers each having more than 40,000 business access lines
- Tier 2: Impairment subject to TRO triggers on routes between wire centers each having 20,000-40,000 business access lines
- Tier 3: Conclusive finding of impairment on routes between wire centers below 20,000 business access lines

Alpheus proposes a dark fiber impairment framework that varies from the other similar test imposed for lit transport because Alpheus agrees with the Commission's finding in the TRO that there are distinct differences between dark fiber transport and lit transport that warrant treatment as a different product market from DS3 transport.[29] . Thus Alpheus proposes a more distinct impairment test (and transition mechanism) for dark fiber. Moreover , Alpheus makes no claim whatever to "greenfield fiber" for transport. The fiber in question was built many years ago at ratepayer expense, and is idle and unused by definition. As the Commission recognized in the *TRO*, the availability of dark fiber permits competitors to develop innovative services that differ from those offered by the ILEC; whereas using lit UNEs confines the CLEC to the capabilities of the ILEC's service. Because dark fiber requires substantial capital investment to light the fiber and create a reliable and robust network, it is physically and financially different than lit fiber services. Further unlike lit fiber services, there is no special access equivalent for UNE dark fiber as the RBOCs do not tariff dark fiber. Therefore, the consequences for removing a given fiber route from impaired status to unimpaired is not incremental cost; it is no less than the disconnection and reconstruction of an expensive, deployed network.

Keeping dark fiber transport unbundled is consistent with the Commission's inclusion in the impairment test of other considerations such as promoting deployment of broadband under § 706. Unbundling dark fiber transport has no economic effect on the ILEC incentive to invest, because the investments in fiber transport were made years ago and new ones are not being made. These facilities are legacy facilities, deployed when the ILEC were state sanctioned monopolies. Importantly, ILECs are not deploying new dedicated transport fiber because they

[29] Cite *TRO* ¶¶ 381-382.

retain vast quantities of spare fiber in their interoffice cables and need not deploy new fiber. In fact, given advances in fiber optronics, there is much more fiber than any carrier needs.

A. *USTA II* Requires Only Limited Modifications To The Commission's Route Specific Impairment Approach

There is no serious debate that competitors are impaired in many instances without access to unbundled dark fiber dedicated transport. The *TRO* held that CLECs were presumptively impaired on a national basis without unbundled access to dark fiber transport.[30] But in response to *USTA I's* demand for a more granular analysis, the Commission speculated that under certain select circumstances there may be sufficient evidence of competitive deployment on a particular transport route so as to justify a non-impairment finding. Accordingly, the *TRO* could have subjected each and every transport route in the nation to an independent impairment analysis.

But whereas *USTA I* criticized the Commission for generalizing too much, *USTA II* found fault in generalizing too little. While the court agreed that a non-impairment finding for one route did not compel a non-impairment finding for all similar routes, it found that this fact should not be deemed irrelevant either.[31] The Court found that the Commission must at least consider whether some degree of extrapolation of evidence from one route to others may be appropriate, although it conceded that in fact "it may be infeasible" to develop a standard that "may usefully be applied to" a larger geographic market.[32] *USTA II* therefore still permits the definition of the relevant market as specific interoffice transport route, but the Commission must also consider whether evidence of non-impairment for certain categories of routes is sufficiently extensive to reasonably permit a presumption of non-impairment for a narrowly-tailored class of similarly-

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30 *TRO*, ¶ 359.

31 *USTA II* at 575.

32 *Id*.

situated routes. While route-by-route evaluations still offer the most accurate means of determining impairment, the Commission may reasonably be able to make impairment determinations for certain classes of routes if supported by substantial evidence – some that would be exempted from unbundling, and others that would be subject to unbundling without the conduct of an independent route-by-route review.

The evidence from the state *TRO* proceedings and submitted to date in this proceeding shows patterns of competitive deployment of fiber transport facilities that would allow for such assumptions. It appears that the record in this proceeding, including data accumulated during the state *TRO* cases, will likely show: (1) significant deployment between the very largest wire centers in the urban cores of major metropolitan areas defined using business access line density; (2) a mixed record between medium-sized wire centers in these metropolitan areas; and (3) scant deployment on routes between wire centers with low business access line density. As set forth below, Alpheus is confident that the record will adequately support this tiered approach to unbundling dedicated transport.

1. The Commission Can Make a Finding of No-Impairment for the Largest Wire Centers.

The ILECs' own presentations confirm, particularly by their omissions, that competitive deployment of transport is essentially limited to just certain routes in the largest urban centers. Verizon, for example, recently emphasized that competitive deployment is "most heavily concentrated" between just 8% of its wire centers in its twenty largest MSAs.[33] SBC emphasizes CLEC deployment in the sixty-one largest metropolitan areas nationwide "where demand for high capacity services is concentrated."[34] Moreover, the data and maps presented by Verizon

[33] *Verizon* July 2, 2004 *Ex Parte* Letter, at 6.

[34] SBC Aug. 18, 2004 *Ex Parte* Letter, at 2.

and SBC, even if they are accurate, suggest that the vast majority of all competitive deployment nationwide exists only within certain pockets of the largest MSAs. This fact is corroborated by the Ad Hoc Telecommunications Users Report, which concluded that "special access services from competing providers remains confined to a small number … of concentrated business districts."[35] Therefore, Alpheus suggests that the Commission could, based upon evidence presented in this proceeding, make a finding of no-impairment for dark fiber transport routes between wire centers each serving more than 40,000 business access lines.[36] Alpheus knows there may be routes included in this tier of transport routes for which there actually is impairment, but understands the desire to find a reasonable proxy pursuant to the directives of *USTA II* in this regard.[37]

The use of business access lines has some value as a proxy for when competitors have in the past deployed fiber transport between ILEC central offices. In other words, above a certain level of business access line density, carriers have been able to obtain revenue sufficient to overcome the enormous barriers to entry the Commission properly identified in the *TRO*. Further, using business access line density, rather than total lines or other measures of line counts per wire center, is more appropriate because, to date, the business market has proven the most ripe for competition because businesses have higher demands for telecommunications services, have a strong demand for very high capacity bandwidth that requires fiber connections, and are

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[35] Ad Hoc Users Report, 12.

[36] The business access line thresholds set forth in these Comments are based upon Alpheus' understanding of data used by the Commission in the non rural high cost universal service proceeding. The data does not reflect actual wire center density data but rather was designed to find some correlations that explained where Alpheus in its experience was confident it could deploy its own fiber facilities and where to its understanding other companies already have deployed. Any thresholds based upon the number of lines should be limited to the PNR access line density model presented to the Commission in this proceeding. Any adjustment in the source of the data might find that because of changes in technology or service patterns there would be a resulting increase in the number of business access lines that would not necessarily correspond to a decrease in impairment.

[37] See e.g. *USTA II* at 570 (discussing inevitability of "*some* over- and under-inclusiveness.") (emphasis in original).

frequently concentrated in urban centers in large multi-tenant commercial office buildings, thus reducing the cost of serving multiple customers with a fiber ring.[38] Together, these factors strongly suggest the business access line data is a reasonable proxy for competitive ability to deploy fiber and obtain sufficient revenues to overcome the barriers to such deployment.

The results of this test confirm this correlation. In the Texas markets with which Alpheus is most familiar, 81 dedicated transport routes in Dallas and Houston would be subject to a finding of no impairment

Most parties agree that "special access services from competing providers remains confined to a small number … of concentrated business districts."[39] In addition, the ILECs effectively concede that competitive entry is typically limited to "major metropolitan areas". SBC, for example states that CLECs in its territories deploy alternative fiber facilities "in major metropolitan areas where demand for high capacity services is concentrated".[40] SBC implicitly defines the "major metropolitan areas as the top 61."[41] Verizon further observes that high capacity demand in its territory is "most heavily concentrated" in its Top 20 MSAs and that concentration represents "fewer then 8 percent of [Verizon's] wire centers."[42] Thus, this proxy for non-impairment appears fair and balanced, based on the data the ILECs have submitted. Indeed, the ILECs cannot reasonably expect the Commission to adopt an impairment framework for dedicated transport that does not preserve unbundled access where the ILECs admit there is little, if any, competitive deployment.

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38 Alpheus Decl. ¶¶ 29-31.

39 Ad Hoc Users Report at 12.

40 SBC Aug. 18 Ex Parte at 2.

41 *See id*.

42 *Verizon* June 24, 2004 Ex Parte, Attachment, at p. 3.

2. The Commission Should Make a Conclusive Finding of Impairment for Smaller Wire Centers

But just as the Commission, acting within the confines of *USTA II*, may reasonably be able to assume non-impairment on routes between wire centers each with more than 50,000 business access lines, it also can and should establish uncontestable findings of impairment for areas where evidence of actual or potential competitive deployment is so lacking that the conduct of route-by-route analyses would be a waste of the Commission's and the parties' resources. The record is abundantly clear from the *Triennial Review*, the state *TRO* proceedings and Alpheus' own experience in Texas that there is scant evidence of competitive transport deployment on routes between wire centers with fewer than 20,000 business access lines.[43]

Approximately twenty-five state proceedings were conducted at least through the hearing phase. The evidence from these cases, which Alpheus expects will be presented by the states and by other parties, found that very few transport routes met the *TRO*'s triggers, and of these, nearly all were located between two large wire centers in New York City.

Evidence adduced in the *TRO* proceedings typically demonstrated that CLECs could justify deploying fiber and lighting it at OCn capacities when aggregating traffic from the ILEC network to their switch.[44] In very few instances, however, was the competitive carrier able to justify providing dedicated transport *between* ILEC wire centers. Thus on most routes examined in the *TRO* transport cases, the evidence shows that CLECs are not capable of self-providing

[43] Even where evidence of actual deployment exists, it is questionable in hindsight whether many of these investments could or would be made today by reasonably efficient and rational competitors. Many carriers have reorganized themselves through bankruptcy to shed debt used to build facilities that could not generate the revenue to pay down the debt.

[44] The economics of such deployment and how CLECs can overcome the entry barriers associated with such deployment are addressed more fully in the section below dealing with unbundled access to entrance facilities.

dedicated transport and are, except in rare circumstances, not able to find wholesale substitutes for unbundled transport.

On an aggregate basis, the QSI study[45] demonstrates that despite ILEC claims to the contrary there were very few routes contested in *TRO* transport proceedings where the Commission's triggers were satisfied. QSI surveyed and summarized state TRO proceedings in 14 states.[46] In those states only 55 routes satisfied the DS3 self provisioning trigger and 48 of those routes were from New York, primarily Manhattan.[47] For the dark fiber self provisioning trigger all 46 routes where the trigger was satisfied were in New York City.[48] The numbers were less when the wholesale trigger was applied. For DS3 transport, 40 routes satisfied the triggers, and 37 of those were in New York and were a subset of the routes eliminated under the DS3 self-provisioning trigger. Interestingly the TRO trigger analysis provided by QSI shows no routes where 2 or more carriers provide wholesale dark fiber.

In New York the Public Service Commission staff issued its analysis of the transport trigger. The PSC staff narrowed the nearly 4000 transport routes Verizon claimed met the triggers in its initial filing,[49] based on data collected from CLECs and other carriers.[50] As result of its analysis the NY PSC staff found that for DS3 transport, the FCC's self-provisioning trigger was only satisfied on 48 routes.[51] The staff also recommended that 37 routes met the wholesale

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45 QSI Study attached to comments of ALTS *et al*, filed Oct. 4, 2004.

46 The states are as follows: Michigan, Illinois, Ohio, Wisconsin, Indiana, Missouri, Oklahoma, Texas, Florida, Tennessee, Georgia, Washington, New York, California.

47 QSI Study at p. 17 Table 5; *see also NYPSC Staff Report* at Attachment 5.

48 QSI Study, at p. 18 Table 6; NYPSC Staff Report at Attachment 7.

49 QSI Study at 17.

50 NYPSC Staff report, Case at 3-4. (for instance some of the routes Verizon include in its initial list of trigger candidates were interLATA routes, on which CLECs were already unable to obtain as UNEs peer FCC rules).

51 *Id*. at 4.

trigger. However a comparison of the routes listed meeting the self -provisioning trigger shows that all routes that meet the wholesale trigger also met the self provisioning trigger.[52]

The state commission findings of the absence of competitive alternatives outside of the major urban cores is confirmed by the persuasive and reliable third-party evidence presented by the Ad Hoc Users Report. According to the Ad Hoc Users, "competitive [dedicated transport] service is available on a very limited basis, and the [ILECs] remain the sole source of dedicated (special) access connectivity at roughly 98% of all business premises nationwide."[53] Thus even large corporate users remain "overwhelmingly dependent upon the traditional incumbent telephone monopolies for the vast majority of locations and service requirements."[54] And the ILECs' continued dominance of these markets is confirmed by their own behavior -- Qwest recently proposed a 68% increase in its tariffed DS3 special access rates,[55] while other RBOC special access rates remain unreasonably high.[56] The RBOCs' inflated rates for special access services could not be sustained in a competitive transport market.[57]

For these third-tier routes, therefore, the Commission would be justified in making a blanket finding that its previous presumption of impairment is elevated to a finding of impairment. The *TRO* already established, and nothing in the record contradicts, the basis for a

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[52] *See Id*. at Attachment 5 and 6 (Attachment 6 shows 37 DS3 transport routes where there are at least 2 wholesale alternatives for DS3 and the exact same 37 routes appear on Attachment 5 showing at least 3 carriers self-providing DS3 transport.

[53] Ad Hoc Users Report, at 11.

[54] *Id*. at 12.

[55] See Qwest Tariff Transmittal 206, AT&T Petition to Suspend, filed Aug 23, 2004.

[56] *See AT&T Corp. v. BellSouth Telecommunications Inc., Formal Complaint of AT&T Corp.,* Rm Docket No. 10593 (filed July 1, 2004)..

[57] By contrast, for example, in recent years Qwest's rates for ISDN (a competitive service) have fallen by approximately 65%.

general presumption of impairment with respect to dark fiber transport.[58] This presumption is based upon an evidentiary record that reveals that "deploying transport facilities is an expensive and time-consuming process … requiring substantial fixed and sunk costs," including the costs of collocation, fiber-optic cable, construction, obtaining rights-of-way, and the optical equipment to light fiber.[59] Now, on top of this presumption, the records of the state *TRO* proceedings and the utter absence of evidence of significant competitive deployment permits the Commission to move from a presumption to a finding of non-impairment for transport routes between wire centers with 20,000 or fewer business access lines.[60]

3. Transport Routes that Fall in Between Would Remain Subject to Unbundling Pending Application of the *TRO* Triggers

For the transport routes between the two tiers generally described above, the Commission should apply the *TRO* triggers on a route-by-route basis, as it originally contemplated would occur for all transport routes. The evidence submitted by the ILECs to date does not show lack of impairment on any more generalized basis except for the very largest wire centers (included above in Tier 1) which would already be found to have been not impaired. Given the countervailing evidence of impairment as a general matter, as found by the *TRO*, these routes must remain subject to unbundling pending a final determination of non-impairment applying the TRO triggers on a route-by-route basis.

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[58] *TRO*, ¶ 359.

[59] *TRO*, ¶ 371.

[60] To further define the application of the test, it is crucial to understand the route and the wire centers it supports. Since routes are point to point and specific to wire centers, they must be judged on the lesser wire center. By way of example, if a Tier Two wire center connects to a Tier Three wire center, it would be rated by the Tier Three test, since the evidence indicates that CLEC are typically not deploying to Tier Three wire centers. Thus, when the wire centers on the route are not in the same tier, the lesser tier standard governs.

In this middle tier, substantial variability in the entry barriers among different routes seems to make it all but impossible to infer that entry on one route makes entry on another efficient. Alpheus' experience demonstrates that there are significant differences in the costs to construct a transport route between central offices, even from one adjacent street to another.[61] The *TRO* therefore recognized that "operational and economic concerns … will vary depending on the geographic market served" with the result that "the extent of competitive deployment of transport facilities can vary tremendously by geographic area."[62] For example, many major cities have prohibited additional trenching in city streets for a period of years after the city has repaved its streets.[63] An impairment test that assumed impairment throughout an entire city or metropolitan area would fail to account for such differences and would therefore fall short of the Commission's statutory obligation to consider impairment in implementing the Act.

Using the court's example,[64] the existence of competition on the route between A to B may be explained because additional trenching has been and remains permissible on those streets while it is not permissible on the streets comprising the route from A to C. Alpheus has come across such instances in practice. In some metropolitan areas, local governments have erected impenetrable barriers to new fiber construction that involves digging in city streets. For instance, in San Antonio, there are some streets in the central district built with brick pavers. In order to trench on that section of the street, construction crews must carefully remove each brick by hand, place it on the side of the street, and pencil on side a number so that when its time to replace the

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61 Alpheus Decl. ¶¶ 55-58.

62 *TRO*, ¶ 376.

63 In response to the court's hypothetical question, evidence of competition on route A to B may be explained because competitors were permitted to trench a continuous path on that route, which may not be a permissible option for the entire route between wire center A and wire center C. *See USTA II*, at 575.

64 *USTA II*, 359 F.3d at 575.

bricks they can be installed in the same location they were before removal.[65] In such cases an impairment inquiry that ignored the cost variances from street to street or block to block would eliminate competitors' access to ILEC facilities on routes where economic self deployment was not possible and no alternative sources of supply had developed.

a. Use of the Triggers is Consistent with USTA I and II

In the *TRO* the Commission explained that it set the triggers consistent with the D.C. Circuit's view that no impairment existed where a particular market was "suitable for multiple, competitive supply."[66] Likewise the court in USTA II suggests that the Commission establish appropriate triggers, seeking to identify "multiple competitors" on each route.[67] Because the triggers themselves were not attacked on appeal and were implicitly approved by the court, the Commission should readopt the triggers but alter the mechanics of how the triggers are applied in order to address the Court's *vacatur*.

Although the Court criticized the Commission's route specific review it specially contemplated the likelihood that the Commission would find applying the impairment standard unworkable in a geographic market larger than a specific point to point route. The Court acknowledged that "it may be infeasible to define the barriers to entry in a manageable form, i.e. in such a way that they may usefully be applied to MSAs (or other plausible markets) as a whole."[68] The Court never said that the route specific review conflicted with the Act but rather that the Commission "nowhere suggests" that it explored alternative (and broader) geographic

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[65] Alpheus Decl. ¶ 122.

[66] TRO ¶ 405 *citing USTA v. FCC*, 290 F.3d at 427.

[67] *USTA II*, 359 F.3d at 575. In acknowledging that the impairment standard under the act requires the Commission to "reach a bit beyond natural monopoly" the D.C Circuit implicitly sanctions the use of triggers that require multiple competitors to reach a finding of non-impairment. *Id*. at 572.

[68] *USTA II*, 359 F. 3d at 575.

markets and that it did not adequately explain "why the error costs (both false positives and false negatives) associated with a route-by-route market definition are likely to be lower than the error costs associated with alternative market definitions."[69] By adopting the three tiered framework discussed above, the Commission can address the Court's criticism and retain its route-by-route market definition for dedicated transport and apply the *TRO* triggers on limited transport routes where the Commission's barriers to entry impairment standard can not be "usefully applied to MSAs" or other broad geographic markets."[70]

Recent submission from the ILECs conclusively demonstrate that an MSA wide or other broad geographic market test is inappropriate. Rather they provide evidence that competitive deployment is limited to 8 percent of the wire centers in the largest MSAs.[71] Similarly the ILECs acknowledge that the *potential* for self deployment is limited to those markets where demand for high capacity services is robust. According to their own data those markets are in a small fraction of the MSAs served by the ILECs and only within pockets of those MSAs.

If the Commission were to mistakenly extrapolate these limited instances of deployment into MSA wide findings of non-impairment the costs to the economy would be staggering. Where there currently is no actual competitive deployment or the potential for new deployment, customers would be left without the competitive choice envisioned by the Act. Without access to UNEs in sections of an MSA (or other broad geographic market) customers would be left with no choice but to use the ILEC. As the Ad Hoc Users Report explains, "the ability of a firm to charge higher prices without losing so much business as to make those higher prices

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69 *Id*.

70 *See Id*.

71 *See* Verizon July 2, 2004 ex parte at 6.

unprofitable" is the result of a monopoly unchecked by competition.[72] According the report, the Ad Hoc users estimate the cost of the monopoly profits *currently enjoyed* by the ILECs due to lack of effective competition as $15 million per day stripped out of the American economy that goes to line the pockets of monopolist ILECs. [73] Left unchecked by the faculties-based competition provided by CLECs using dark fiber transport, the ILECs will exponentially increase the excessive monopoly profits they extract from American consumers.

4. ILECs Should Be Allowed To Commercially Negotiate An End To Dark Fiber UNEs

The Commission should also afford the ILECs an opportunity to immediately end the unbundling litigation with respect to dark fiber. Dark fiber is an element that is better suited to longer term arrangements; indeed, in the normal commercial telecom environment, dark fiber is normally leased on a long term basis, known as an indefeasible right of use ("IRU"). IRU terms are typically 20 years or more. The Commission has acknowledged the prominence of IRUs in the context of unbundling by noting that in the TRO triggers, carriers that have obtained IRUs count as "self-provisioned" for the purpose of the *TRO* triggers.

Alpheus proposes that ILECs be relieved of unbundling UNE dark fiber routes simply by acting as a normal commercial participant and enter into IRUs with CLECs for its dormant spare fiber. Under this test, a dark fiber transport route would be deemed no longer impaired if the ILEC entered into IRUs, with a minimum 20 year term, with each CLEC holding UNE dark fiber dedicated transport on that route. At that point, the route would be deemed a non-impaired route

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[72] Ad Hoc Users Report at 4.

[73] The Ad Hoc Users estimate of the cost to the economy are conservative because the excess profit it attributes to the ILEC is the difference between current rates and historical embedded costs. The gap would be significantly larger if, as they should be the current rates were compared to the forward looking costs the ILEC incurs to provide the service using a TELRIC methodology to derive that cost.

and the Commission would relieve the ILEC of its unbundling requirement for that route. Routes on which no CLEC currently maintains any UNE dark fiber would remain subject to the other impairment tests until UNE dark fiber is obtained by a CLEC and converted to an IRU. The natural progression then would be to allow ILECs to eliminate their unbundling dark fiber obligation where they allow existing UNE dark fiber customers to IRU the fiber they are currently using for a 20 year term. Similarly this IRU would also effect the TRO triggers, as if four carriers have IRUs and one carrier declines the ILEC offer, the trigger still requires that no UNE fiber be available because the self-provision trigger has been met.[74]

This approach has the benefit of economic efficiency given that it avoids the wasting of unused fiber at a time when al policymakers, both state and federal, have announced broadband infrastructure incentives.

B. The Commission's Factual Findings on Dedicated Dark Fiber Transport Remain Valid

The Commission further observed that "deploying transport facilities is an expensive and time-consuming process … requiring substantial fixed and sunk costs.[75] Among the costs the Commission found were associated with transport deployment were collocation costs, cost of fiber-optic cable, construction costs for physically laying the cable, obtaining rights-of-way, and cost of optical equipment to light fiber.[76]

The Commission then analyzed impairment for dedicated transport based on the capacity level sought by the requesting carrier because such analysis "is a more reliable indicator of the

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[74] *See* 47 C.F.R. § 319(e)(2)(i)(B)(1).

[75] *TRO* ¶ 371.

[76] *Id*.

economic abilities of a requesting carrier to utilize third-party alternatives, or to self deploy."[77] In particular the Commission found that " a carrier using higher capacity levels of transport has a greater incentive and broader revenue base to support the self-provisioning of transport facilities."[78] Thus the Commission determined that CLECs were not impaired without access to dedicated transport at a level of OCn or above but were impaired without access to DS1, DS3 and dark fiber transport.

Likewise the Commission recognized that dark fiber transport was a separate product from "lit" transport and thus "lit" transport was not a substitute for dark fiber transport.

The same factual predicate that the Commission established for the dedicated transport market remain valid today, was implicitly authorized by the court in *USTA II* and should be affirmed in the Commission's order.

C. The Commission Should Retain the Definition of Dedicated Transport Adopted in the *TRO*

As explained in more detail in the discussion of entrance facilities, the Commission should analyze impairment for dedicated transport separately from its analysis for entrance facilities. Thus Alpheus urges the Commission to adopt a definition of dedicated transport that is limited to "transmission facilities connecting ILEC switches and wire centers within a LATA."[79] Of course, the Commission should affirm its finding that the ILECs may not avoid their obligation to provided unbundled access to transport simply because the ILEC has "reverse collocated" its own equipment at the premises of a CLEC or a collocation hotel.[80] To avoid

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[77] *TRO* ¶ 376.

[78] TRO ¶ 377.

[79] *TRO* ¶ 365.

[80] *TRO* ¶369 n. 1126.

needless litigation, the Commission should explicitly clarify that to the extent the ILEC places equipment at a non-ILEC building and connects that switching equipment to other ILEC switching equipment, that transmission facility remains dedicated transport even through the wire center is not the ILEC's.

D. The Commission Should Ameliorate CLEC Impairment by Prohibiting the ILECs' Anticompetitive Exclusive Service Arraignments.

Alpheus' emphasis on the evidence of its impairment should not be taken as an indication that they prefer UNE access to the ability to compete with the ILECs on a level playing field. On the contrary, Alpheus shares the Commission's objective of promoting sustainable facilities-based competition. Accordingly, in its review of CLEC impairment, the Commission should also seek to address sources of existing impairment that are within the Commission's control.

One of the significant market distortions (contributing to CLEC impairment) is caused by the ILECs anticompetitive market behavior. The RBOCs' access tariff pricing plans regularly contain provisions that grant price concessions to customers that commit to refrain from using competitive or self-deployed access services.[81] Such provisions allow the incumbents to lock up potential customers and deny would-be competitive wholesale providers access to a significant segment of the addressable market for dedicated transport. By sucking the air out of the addressable market, the ILECs impede competitive wholesale deployment before it ever occurs.[82] The Commission acknowledged the relationship between competitive entry decisions and "lock up" provisions in the *Pricing Flexibility Order*, observing that an ILEC "can forestall the entry of potential competitors by "locking up" large customers by offering them volume and

[81] *See AT&T Corp. v. BellSouth Telecommunications Inc., Formal Complaint of AT&T Corp.,* Rm Docket No. 10593 (filed July 1, 2004).

[82] There is no dispute that CLECs cannot economically self-deploy competitive facilities without a sufficient revenue commitment to cover the capital costs they incur to deploy facilities needed to provide the requested service.

term discounts."[83] This behavior is completely antithetical to any future competitive market. Whether or not one believes that the RBOC's operate their wholesale operations as a protective racket for their retail business, this type of brute force or "reverse arbitrage" is anti-consumer in the extreme. The Commission should therefore prohibit incumbent carriers from offering or enforcing these anticompetitive lock-up terms for special access services. In other words, the playing field should be level for competition and ILECs should not be able to tariff their monopoly legacy into the future.

V. CLECS REMAIN IMPAIRED WITHOUT ACCESS TO DARK FIBER LOOPS

Local loops are the bedrock element of local telephone competition. Without access to loops, the quintessential bottleneck facility, competitors have no means of accessing the customer. Since passage of the 1996 Act, the Commission has consistently maintained the ILECs' loop unbundling obligations. Although *USTA II* remanded and vacated significant components of the *TRO*, it did not disturb the fundamental determination that competitors remain impaired without access to unbundled loops, including DS1, DS3 and dark fiber loops. For these reasons the Commission can adopt the loop unbundling framework proposed below.[84]

In the *TRO*, the Commission unanimously supported the continued availability of unbundled access to dark fiber loops on a nationwide basis. The Commission found impairment because the record made clear that CLECs faced enormous barriers to self-provisioning such

[83] *Access Charge Reform*, Fifth Report and Order, 14 FCC Rcd 14221 ¶ 79 (1999) (The Commission further observed that this has ramifications for smaller customers as well because competitors typically will deploy to serve the high demand customers, then can serve smaller adjacent customers using same facilities. In effect by locking up the large corporate users the ILEC locks up the adjacent small business customers as well).

[84] Because the Commission held that CLECs are not impaired without access to OCn loops as UNEs, the Commission should affirm its finding that CLECs are impaired without access to dark fiber loops because if CLECs cannot economically construct their fiber facilities in order to deploy their own OCn loops, CLECs should be able to deploy their own optronics and light unbundled dark fiber loops.

facilities and there was scant evidence of competitive wholesale alternatives.[85] Since the Commission released the *TRO*, nothing has changed to warrant anything less than a finding that carriers are generally impaired in serving enterprise customers without unbundled access to dark fiber loops. Indeed, the Commission's finding in the *TRO* that there are "steep economic barriers associated with alternative deployment" remains correct.

A. The Commission's Findings Regarding Barriers to Competitive Fiber Loop Deployment Remain Valid

1. Loop Deployment Remains Costly

The Courts have recognized that unbundled access to loops may be justified because the loop element is "very expensive to duplicate."[86] Consistent with the Supreme Court's recognition that loops are expensive to duplicate, the *TRO* found significant marketplace evidence that bears this out. The Commission found that because loops serve a single customer location they and installing loops "is very expensive" "most of the costs of constructing loops are sunk costs."[87] The *TRO* further explained that "fixed costs for constructing loops are quite high."[88] Of these fixed costs, "the most significant portion of the costs incurred result from deploying the physical fiber infrastructure in the ground, rather than from lighting the fiber."[89] These statements about loop deployment costs remain just as valid today as they were when adopted in the *TRO*.[90]

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85 *TRO*, ¶¶ 311, 313.

86 *USTA I*, 290 F.3d at 426 *citing* Verizon, 535 U.S. 467 at n. 27.

87 *TRO* ¶ 205; *See also* Alpheus Declaration ¶ 7.

88 *Id*.

89 *TRO* ¶ 206.

90 Alpheus Decl. ¶ 7, 13, 46-57, 92-95, 104-125.

Certainly the Commission cannot ignore the fact that many, if not most, of the competitive carriers that have deployed their own extensive loop facilities have not done so successfully; rather such deployments have been through multiple bankruptcy proceedings where the capital and debt acquired to finance such loop deployments has been eliminated in the Chapter 11 process.

2. Operational Barriers to Loop Deployment Still exist

The *TRO* properly recognizes that when CLECs seek to serve enterprise customers, the revenue commitment available from the customer determines what type of loop should be deployed. For Alpheus, loop construction depends on the revenue and term commitment that the customer is willing to provide balanced against the cost of construction which can vary greatly based on multiple factors such as building access availability, length of the loop, whether duct is available , street moratoriums and other rights of way issues.[91] It is not sufficient to ignore one side or the other of the revenue/cost equation. For all fiber deployment, but particularly for loop deployment, there is simply too much variance in deployment cost to do this type of analysis.

Even where a long term (five years or more) commitment from the customer is forthcoming, "there are other obstacles that must be overcome"[92] before Alpheus can deploy its own fiber loop. The most significant barriers to loop deployment to enterprise customers are the cost and time to obtain access to construct in the public right-of-way and the terms, prices and conditions to obtain building access in order to deliver the fiber facility to the customer location in order to provide service.[93] The *TRO* correctly found, as confirmed by Alpheus experience deploying fiber loops, that "convincing customers to accept the delays and uncertainty associated

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[91] Alpheus Decl. ¶ 92-95.

[92] *TRO* ¶ 303.

[93] *Id*.

with deployment of alternative loop facilities" is an operational barrier that frequently makes loop deployment not economic even where the costs can be recouped under multi-year contracts for very high capacity services.[94]

The Commission's descriptions of these entry barriers in the *TRO* remain accurate in today's marketplace. Since the end of the late 1990's fiber goldrush, business owners and municipalities have become savvy operators in seeking to maximize the value of their assets and minimize repeated disruptions to their residents. In Texas, both Dallas and Houston have enacted strict moratoria that bar trenching on city streets where streets have been resurfaced in the last five years. Houston, for instance has undertaken a massive street rehabilitation program to improve its streets, accommodate new light rail and build streets that withstand the weight of the city's buses. Trenching on these existing streets is essentially off limits.[95]

B. The Commission Should Make a National Finding of Impairment for Dark Fiber Loops Subject to the TRO Triggers

Consistent with the *TRO*, CLECs are still "impaired at most customer locations without access to unbundled dark fiber loops."[96] CLECs continue to be unable to "recover the significant fixed and sunk construction costs of the fiber deployment" and overcome the additional barriers to loop deployment associated with accessing rights-of-way; obtaining and paying for building access; and other service provisioning delays that impair the ability of requesting carriers to self-provision fiber loops.[97] It therefore remains the case that "sufficient revenue opportunity to overcome these barriers," is typically not available when deploying alternative loop facilities.[98]

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94 *See Id.*; see also Alpheus Decl. ¶ 7, 96, 104.

95 *Id.* ¶ 112.

96 TRO, ¶ 311.

97 TRO, ¶ 312; Alpheus Decl. ¶¶ 92-95, 46-57.

98 TRO, ¶ 320; Alpheus Decl. ¶¶ 7, 13, 96, 104

Indeed, given the substantial sunk costs of duplicating an ILEC's fiber loop, the aggregation of customer traffic must be extensive before such traffic will meet or exceed the sunk deployment costs. Because the Commission's impairment analysis rests most heavily on the ability of a self-deploying carrier to recover its sunk and fixed costs, CLECs are still impaired without access to Dark Fiber loops due to their inability to recover such costs without "sufficient demand for lit fiber."[99]

As the *TRO* recognized, although competitive alternatives may be available to a small fraction of buildings in dense urban areas, the vast majority of customer locations do not have any alternative facilities deployed.[100] Verizon even acknowledges that 80 percent of demand for special access in Verizon territory is concentrated in only 8 percent of its wire centers.[101] Recent RBOC ex parte filings admit that deployment of fiber loops is typically limited to dense urban areas within major metropolitan business centers.[102] Given this, the Commission is justified in making a national finding of impairment because the evidence submitted by the ILECs shows no broad markets where competitors have deployed fiber loops in significant numbers.

A close examination of the MSAs identified by the RBOCs reveals that few competitors have self-deployed Dark Fiber loops. The QSI Study makes this precise point. Tellingly, with respect to the 12 states that QSI evaluated TRO trigger case data, data supplied by both CLECs and the ILECs under oath, no buildings satisfied the Dark Fiber self provisioning trigger for loops.

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99 TRO, ¶ 320; Alpheus Decl. ¶ 7.

100 *See* TRO, ¶ 321-22; Alpheus Decl. ¶ 13.

101 Verizon July 2 Ex Parte Letter at 6.

102 SBC Aug. 18 Ex Parte Letter at 2.

QSI's report is unsurprising given the significant costs and entry barriers that CLECs confront when deploying fiber loops. It is thus unremarkable that CLECs are providing their own fiber facilities at best to only one percent of the estimated three million buildings in the United States that ILECs serve.[103] As a general matter, those fiber loops are deployed with the intention of serving customers with significant demand. This is so because self-provisioning loops to serve limited demand is not justifiable when considering all the costs, including the cost associated with multiplexing equipment needed to light the fiber.

The *TRO* recognized that even if a carrier has deployed Dark Fiber loop facilities to a specific customer within a certain building, that does not mean that the carrier has access to other customers in the building or access points throughout the building (including, in multi-tenant buildings, access to the same common space, house, and riser, and other intra-building wire) as the ILEC enjoys.[104] In many cases, CLEC access is limited to a "fiber to the floor" arrangement with the customer it serves because CLECs are unable to secure building owners" permission to locate equipment in the buildings common space or access other floors in a building.[105] As a result, such CLECs are thereby precluded from serving customers on different floors within the same building.

Because the scant evidence of Dark Fiber loop non-impairment, a conclusive Dark Fiber loop impairment finding is justified. Although a general finding of this nature may possibly include some false positives, a sensible definition need not be foolproof.[106] The odds of false results, however, are extremely limited due to (1) the small number of known locations in which

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[103] Ad Hoc Users Report, at 12.

[104] 47 U.S.C. 51.319(a)(4)((ii)(B); *TRO*, ¶ 337.

[105] Alpheus Decl. ¶ 47-49, 57.

[106] *USTA II*, 359 F.3d at 570 (recognizing the "inevitability of *some* over- and under-inclusiveness in the Commission's unbundling rules") (emphasis in original).

two or more competitors have deployed their own dark fiber loops; and, (2) the significant costs associated with deploying dark fiber loops.

Thus the Commission's impairment determinations for dark fiber loops is not the type of broad finding found objectionable by the D.C. Circuit in USTA II. Rather the loop unbundling determination proposed herein is a "rational rule" that is not "impermissibly broad."[107] Even if the Court were to perceive it as overbroad, the Court recognized that such determinations "can be saved by 'safety valve' waiver or exception procedures" such as the TRO triggers.[108]

1. Alpheus Has Few if Any Alternatives to Using ILEC Fiber Loop Facilities

Alpheus' frequent attempts to deploy fiber to commercial buildings in Texas is typically frustrated due to the obstacles the Commission identified in the *TRO*. Most of Alpheus' "loop" deployments are to buildings where its carrier customers have located POPs, but its experience deploying fiber to these buildings has frequently been uneconomic due to the cost of overcoming those obstacles. This is telling because when Alpheus deploys fiber to carrier POPs (entrance facility) it expects significant revenue from the very high capacity (OCn) services Alpheus provides its carrier customers at their POP locations.

The most significant obstacle is clearly the consistent inability to secure building access rights that allow economic entry into commercial buildings. First, commercial landlord building access requirements vary widely from market to market and from building to building.[109] This alone influences decisions to deploy because CLECs typically need the ability to economically connect more than one customer to particular fiber facilities. Rather than build point to point loops as the ILEC have, CLECs build rings, and add loops to those rings by constructing lateral

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[107] *See Id.*, at 571.

[108] *Id*.

[109] Alpheus Decl. ¶ 47.

off of those rings. Justifying building the ring in the first place, however, requires the ability to economically provision laterals to add traffic to the ring.[110]

Alpheus has experienced significant difficulties in obtaining building access on terms and conditions that allow Alpheus to economically deploy fiber to commercial buildings. In some cases the issue with landlords is the term of access, for example limiting use of existing risers fro fiber but allowing termination of fiber in a telephone closet in the basement. In other instances it is the cost of building access that makes serving the building, at almost any price, uneconomic. For instance Alpheus has experienced building access demands that represent a 2000% increase of the cost of a dark fiber loop, not including the cost of the fiber or the construction.[111] On other occasions, Alpheus "often is required to pay more per square foot for space in a broom closet than the tenants who occupy plush offices within the building."

Part of the problem with building access is the first mover advantage the ILEC retains from its monopoly legacy. In many cases building owners still rely on using SBC when constructing new buildings which not only provides SBC an initial advantage, but in many cases one that cannot subsequently be overcome because the subsequent costs of entry can rise due to street cut moratoria and other limits on deployment.[112] SBC of course exploits this advantage using programs that incent building owners to provide SBC preferable access and impose higher costs on new entrants.[113]

Although accessing the inside of a building poses an obstacle to self deployment of loops, access inside the building is typically useless unless there is access outside the building as well.

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[110] Alpheus Decl. ¶¶ 100-102.

[111] Alpheus Decl. ¶ 48.

[112] Alpheus Decl. ¶ 53.

[113] Alpheus Decl. ¶¶ 49-52.

Thus the same obstacles to obtaining access to rights-of-way and then actually building in that right-of-way applicable to transport deployment are equally problematic for loops. Access into a building can be costly or simply unavailable when the public right-of-way is so congested no other utility can add new lines, underground construction is blocked by pedestrian tunnels, or when the local government has imposed severe restrictions on construction methods in the right-of-way so that deployment of new fiber cable, while possible is never economically justifiable.[114]

Because loops are customer specific, time to provision is critical. Alpheus has lost customers because it has been unable to timely provision loops.[115] In some cases, even extending a short lateral 120 feet can take months simply to obtain permits.[116] These types of delays add to the CLECs costs and time to provision which is a critical factor for customers.

As explained elsewhere above these same impediments plague use of third party fiber alternatives. It is Alpheus experience that other CLECs prefer not to provide competitor access with fiber loops. Those carriers that are willing to provide access typically do not have fiber deployed into buildings but rather allow CLECs to connect to their fiber rings by building laterals. Of course, as demonstrated above, building laterals to use a third party ring is subject to the same obstacles as self deployment, because the lateral must be constructed in the public rights-of-way, and access into the building must be acquired. In may cases the splice point to connect the lateral to the ring requires significant expense because the splice point is not geographically near the customer premises.

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[114] Alpheus Decl. ¶ 103-113.

[115] *Id*.

[116] *Id*. ¶ 120.

2. Evidence from the TRO Cases Supports a National Finding of Impairment

Consistent with the TRO, the Commission's self-provisioning impairment finding should rely most heavily on the economic feasibility of competitive LECs to self-deploy and recover the enormous sunk costs necessary to deploy dark fiber loop facilities.[117] In that regard, the fact still remains that it is economically infeasible for competitive LECs to deploy dark fiber loops, which require significant sunk and fixed construction costs.[118] Where CLECs are unable to recover the sunk costs in self-deploying dark fiber loops deployment is not rational or reasonable. The Commission should continue to acknowledge the "other economic and operational barriers faced by competitive LECs in self-deploying loops generally, e.g., the inability to obtain reasonable and timely access to the customer's premises both in laying the fiber to the location and bringing it into a building thereafter, as well as convincing customers to accept the delays and uncertainty associated with deployment of alternative loop facilities exist with DS1 loop self-deployment."[119] Further, it continues to be infeasible for CLECs "to absorb the additional "costs" associated with these other economic and operational barriers over time"[120]

3. The ILEC Claims of Massive Widespread Alternative Loop Deployment Are Unsupportable and Unrealistic

As to competitive wholesale alternatives for dark fiber loop facilities, the record still has "little evidence" that such last-mile alternatives exist.[121] CLECs are still impaired without unbundled access to dark fiber loop facilities because viable wholesale alternatives are only available on a *de minimis* basis. In fact, there are an estimated three million buildings in the

[117] *TRO*, ¶ 313; Alpheus Decl. ¶ 7.

[118] *TRO*, ¶ 311.

[119] *TRO*, ¶ 326.

[120] *TRO*, ¶¶ 326 (citing paragraph 315 of the *TRO* that discusses the ability to absorb these costs at the OCn loop level).

[121] *TRO*, ¶ 327.

United States that ILECs serve and the record reveals that CLECs provide alternative facilities to only one percent of them at most.[122] Evidence shows that alternative competing providers remain confined to a small number of buildings in a small number of concentrated business districts.[123] Even though some "large users" requirements fall within those highly concentrated urban areas, many major companies have networks that connect, in some cases, tens of thousand of individual sites- the vast majority of which are areas where the ILEC is the only source of connectivity." [124] Indeed, the overwhelming majority of such smaller locations are nowhere near any central business districts or concentration of CLEC facilities.[125]

The fact still remains that even though CLECs have deployed limited amounts of fiber along major streets in concentrated urban business districts, those facilities are only physically connected to a small fraction of the buildings they pass.[126] This is the case because the cost to establish lateral connections are tremendous and only incurred in the limited circumstances when actual or, more wishfully, potential demand in a specific building is sufficiently large enough that costs associated with constructing the lateral can realistically be recovered.[127]

Evidence recently submitted by Verizon, SBC, and Qwest in this proceeding fully illustrates and substantiates the extent of enterprise customers "significant and utter" dependence upon ILEC facilities, even in areas that the ILECs claim the most competitive local service

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[122] Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-338 (filed August 26, 2004) attaching white paper entitled "Competition in Access Markets: A Reality or Illusion" (referenced herein as "Ad Hoc Users Report").

[123] Ad Hoc Users Report, at 12.

[124] *Id*. at 12. Noting that a bank network would typically serve hundreds or thousands of branches and thousands or tens of thousands of ATMs; an airline network would have connections to tens of thousand of travel agents; an automobile manufacturer's network would provide service to thousands of auto dealerships. *Id*. at n.16.

[125] Ad Hoc Users Report, at n.16.

[126] Ad Hoc Users Report, at 13.

[127] *Id*. at 13; Alpheus Decl. ¶ 104.

markets in the country.[128] In these filings, these three RBOCs provided maps purporting to display locations of enterprise customers being served by CLEC-owned facilities. There are numerous flaws with material the ILECs compiled. For example, conspicuously missing from these maps is information regarding the nature and type of the facilities that are offered, OCn, DS3, DS1 or dark fiber. Notably, just because a CLEC may offer OCn does not mean that it offers dark fiber on a wholesale basis (as Alpheus' experience is that very few will) or even has any dark fiber available.[129] Further, just because some locations are being served by CLEC-owned facilities in no way diminishes a RBOC's "absolute monopoly at all locations where no alternative facilities are in place or at locations at which customer demand is insufficient to make CLEC entry economically feasible."[130]

If one takes the facilities deployed by CLECs, cable, and fixed wireless into account, a conservative estimate is that 98% of commercial buildings are not accessed by alternative facilities.[131] AT&T states that of the 186,000 buildings it serves only 5 percent are served with its own facilities or that of an alternative provider and the rest are provisioned by the ILEC.[132] Sprint likewise relies upon the ILECs for more than 93% of its needs in this regard.[133]

As a wholesale carrier in Texas, it is Alpheus' own experience that CLECs, typically seek out opportunities to purchase service from sources other than the ILEC so as to expand the number of buildings where they can bypass ILEC facilities.[134] AT&T has done so and uses CLEC facilities at approximately 3,700 of the approximately 14,000 locations where such

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128 *Id*. at 13.

129 *TRO*, n.1216 & n.1218.

130 Ad Hoc Users Report, at n.19.

131 *Id*. at 16.

132 *Id*. at 17.

133 *Id*. at 17.

134 *Id*. at 18.

facilities are available. [135] AT&T is reluctant, however, to purchase CLEC access facilities, even where they exist [136] and has stated that,

> IXCs that depend upon CLECs for special access often confront a level of uncertainty that threatens to impair their continuing use of such competitive alternatives. According to AT&T more than half of the buildings for which CLEC special access was available are served by CLECs that have declared bankruptcy. Not surprisingly, large users, who cannot afford service disruptions, often direct their principle IXC to avoid obtaining access links from potentially unstable, bankrupt CLECs. Moreover CLECs are not always able to secure the building owners" permission to locate equipment in the building's common space, so that in many cases access is limited to a "fiber to the floor" arrangement in which only particular floors in the building can be served. Thus even where there is competitive special access in a building, there is not always competitive special access available to serve all the customers in that building.[137]

End users have similar reservations and concerns. Ad Hoc Users also noted the specific criteria they consider in determining whether they can use a competitive carrier at those locations if one is available. Specifically, they stated that,

> Service quality, reliability, and security are all critical issues that business end users must consider when evaluating competitive alternatives to the ILEC's broadband service offerings. CLEC network ubiquity and price are two other interrelated issues. Because CLEC networks are not as ubiquitous as those of the incumbents, many business service locations seeking broadband services from a CLEC either require (1) additional build-out by the competitor, or (2) "backhauling" of access to the CLEC POP (at the customer's expense). Either outcome increases the cost of service as compared to the ILEC, creating additional barriers for CLEC efforts to penetrate the business end user market.[138]

In the end, "issues of total cost, network integration, reliability, and responsiveness ultimately determine whether a competitor's service is considered by an end user to be a viable

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135 *Id*. at 18.

136 *Id*. at 18.

137 *Id*. at n.32 (citing RM 10593 Declaration of Kenneth Thomas on Behalf of AT&T, at 2 & 4).

138 *Id*. at 21

alternative in the first place."[139] Indeed, just because there may be competitors in a given market, the services provided by them are compared with those offered by the ILEC and must satisfy the customer's standards for purchase and use.[140] Because of these considerations, CLEC services "rarely" meet Ad Hoc members' needs and as such, "it is clear that the business data service market is far from being effectively competitive…."[141]

As a result of the lack of wholesale alternatives shown above, RBOCs have exploited their dominant position in the marketplace. Indeed, RBOCs fully recognize the lack of competitive alternatives and associated concerns and have increased special access prices after being given pricing flexibility in those markets where they convinced the Commission that competition was realized. For instance, Quest's price for special access DS-1 circuit (10 mile length) was $410 under the price cap unit price; however, since it received pricing flexibility, Qwest has increased the price to $602.[142] This is an astronomical 50% price increase in less than 2 years.

If the marketplace were truly competitive, ILECs would be forced by competitors to lower prices, not increase them. However, since that is not the case, then RBOCs have every incentive to exploit their market power and increase rates as they have done. The conduct of RBOCs speaks far louder than their empty word submitted in these proceedings and since they have no real competitive threats in the areas where they were granted pricing flexibility, they abuse such pricing flexibly by increasing special access rates by excessive amounts rather than decreasing them. Taken as a whole, this evidence fully reveals that competitive alternatives

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139 *Id*. at 21

140 *Id*. at 21

141 *Id*. at 21

142 Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-338, Attachment 1 (filed Sept. 13, 2004).

remains nonexistent or nascent in all marketplaces (including those where the RBOCs have been granted pricing flexibility) and that CLECs remain impaired without access to unbundled dark fiber loops.

C. The Commission Should Apply the TRO Trigger to Identify Locations Where Competitors Have Successfully Provisioned Dark Fiber Loops

In the *TRO*, the Commission reasonably allowed ILECs to challenge the Commission's nationwide enterprise market loop impairment findings on a location specific basis before the state commissions. The Commission established triggers that measured existing self-deployment by CLECs and availability of wholesale supply from non-ILECs to determine whether impairment existed for a specific customer location. The self provisioning and wholesale triggers provide an ILEC with an opportunity to demonstrate that there is no impairment for a specific customer location or route by identifying locations for which there are alternative providers offering wholesale loop and transport services to CLECs or providing such facilities for themselves.

These triggers properly identify where impairment no longer exists, and were not overturned by *USTA II*. Although *USTA II* now requires that the Commission make all non-impairment determinations based on the triggers rather than delegating decisions to state commissions, the Commission can make such determinations itself through a simple annual data collection which is populated by the carriers themselves.

The dark fiber loop trigger properly identifies the means by which the Commission can identify extremely limited instances where CLECs are not impaired without access to dark fiber loops. Because the trigger is applied on a location- specific basis and, therefore, can only be satisfied when competitive deployment actually exists on a given route or at a specific location, it

is less likely to produce false positives than would occur if a different test was applied to broad geographic market such as special access pricing zones or MSAs.

Although *USTA II* criticized the Commission for failing to adequately justify its use of a route specific review, the Court concerns did not explicitly apply to unbundled loops. As discussed above, the court's discussion of the route specific review focused on dedicated transport.[143]

Even if the Court's criticism of the route specific analysis applied to loops, the Commission could sufficiently justify retaining the route specific review because the error costs of an overbroad test would be extremely harmful. In particular, *USTA II* held that the Commission did not properly justify its "implicit decision to treat competition on one route as *irrelevant* to the existence of impairment on the other" or "the error costs (both false positives and false negatives) associated with a route-by-route market definition are likely to be lower than the error costs associated with alternative market definitions." Because of these criticisms, the D.C. Circuit asked the Commission to "explore" whether it would be appropriate to make non-impairment determinations on MSA or route specific basis and fully explain why one approach is appropriate and the other is not under either self-provisioning or wholesale triggers.

Alternative loop deployment however contains characteristics that distinguish it from dedicated transport. First, each building is unique, particularly because the ability of individual landlords to impose monopoly rents to obtain access to buildings that contain large concentrations of desirable enterprise customers.[144] Second, because the loop facility is being used to provide service to a single customer, there are fewer and lower revenue opportunities and a narrower base of customers to bear the costs of deployment. Together these two characteristics

[143] Cite *USTA II*, 359 F.3d at 575? (citing to TRO ¶ 401).

[144] *See* Alpheus Decl. ¶¶ 47-49, 57.

suggest that a test that applies to a broad geographic market would eliminate unbundling to far more locations then where competitive carriers have deployed. Such a decision would leave consumers without a choice for their telecommunications needs which clearly runs counter to the goals of the Act. Conversely if the Commission were required to apply the triggers before finding impairment, the administrative costs and burdens would be extensive and excessive and not worth the cost or time to administer.

As the Commission did in the *TRO*, it should again reject any RBOC requests that non-impairment determinations regarding dark fiber loop facilities be made on an MSA wide basis.[145] There is no record evidence that "loop impairment/non-impairment determinations can be appropriately made on a zone basis due to location specific factors which impact impairment determination at most high capacity loop levels."[146] Nor is there justification to base loop impairment on a "broader scale such as city, MSA, other zone" and any such approaches are "too over-and under-inclusive."[147] "That is, there may be actual impairment on some routes, but not others within a wider geographic area. Thus, a finding of impairment or non-impairment throughout an area could permit unbundling routes where no impairment exists, or foreclose access to unbundled transport on routes where impairment does exist."[148]

A brief review of the maps provided by SBC, Qwest and Verizon, demonstrate that there are significant portions of the MSAs in their respective regions which each respectively concedes there are no alternative facilities. Although Alpheus contends these maps are inaccurate and misleading, they nonetheless are useful in determining any contention that broad geographic

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[145] *TRO*, ¶¶ 341 & 397, 402.

[146] *TRO*, ¶ 341.

[147] *TRO*, ¶ 397.

[148] *TRO*, ¶ 397.

findings of none-impairment are justified Similarly, when given the opportunity to seek non-impairment findings at any location, even the ILECs recognized that there impairment remained the rules in the vast majority y of markets in the country. Thus adoption of an MSA wide test or other broad geographic test would then foreclose effective competition where carriers could not economically self deploy or obtain an alternative loop and consumers would be limited to obtaining telecommunications services from the ILEC.

VI. THE COMMISSION SHOULD RETAIN THE TRO TRIGGERS

Because the impairment tests proposed above rely on using the triggers established in the *TRO*, the Commission needs to carefully apply them in accordance with the guidelines discussed below to ensure that erroneous results do not foreclose access to facilities where impairment actually exists.

A. Self-Provisioning Triggers

Should the self-provisioning triggers be applied, the Commission should place the burden on the ILECs to demonstrate that the triggers have been fully satisfied and ensure that the ILECs are defining loops and transport routes properly. In the *TRO*, the Commission elaborated that "even if, on the incumbent LEC's network, a transport circuit from 'A' to 'Z' passes through an intermediate wire center 'X,' the competing providers must *offer service* connecting wire centers 'A' and 'Z,' but do not have to mirror the network path of the incumbent LEC through wire center 'X'."[149] Thus, under the self-provisioning triggers, the Commission should confirm that transport service is being offered between the two wire centers in question.

[149] *TRO*, ¶ 401.

The Commission's self-provisioning transport trigger also requires that ILECs demonstrate that alternative providers be operationally ready to offer services over their self-provisioned facilities at the relevant capacity level.[150] The Commission needs to recognize that the only effective and practical way of knowing that a CLEC is operationally ready under the self-provisioning triggers is to have actual evidence that the CLEC is actually providing service on the given transport route at the relevant capacity level. This is consistent with the Commission's requirement that evidence be provided that CLECs are *serving* customers using self-provisioned loop services, and that CLECs *offer service* between two wire centers on a given transport route. While the existence of CLEC facilities is obviously a prerequisite to the provision of service, the mere existence of such facilities does not demonstrate whether the equipment can be used to provide the service to satisfy the trigger, whether the CLEC can provide service at the requisite capacity level, nor whether the CLEC has performed the necessary engineering, provisioning, and administrative tasks to ensure that service can be provided at all or in a sufficiently timely manner to permit provisioning services to customers seeking the services within a competitive timeframe.

Another critical consideration that the Commission must be mindful of when applying the self-provisioning triggers is which facilities count as "owned facilities." The Commission should make sure that in order for facilities to count as "owned", the carrier has deployed its "own facilities" on the entire loop or transport route. In the *TRO*, the Commission held there are two ways that a carrier can have ownership over the facilities: (1) the carrier can have legal title to the facilities or (2) the carrier can have a "long-term" (*i.e.,* 10 years or more) dark fiber indefeasible right of use ("IRU") if the fiber is lit by the qualifying carrier by attaching its own

[150] *See TRO*, ¶ 406.

optronics to the facilities. If the carrier does not use its own facilities, then the Commission should not count the carrier for purposes of the self-provisioning trigger.

Significantly, certain facilities should not counted by the Commission as owned facilities. For instance, facilities obtained from other sources such as through special access arrangements, UNEs, capacity leases (unless they are long term IRUs), and all third party provided facilities do not count as "owned facilities." As explained in the *TRO*, a CLEC "using the special access facilities of the incumbent LEC or the transmission facilities of the other competitive provider … would *not* satisfy the definition of a self-provisioning competitor for purposes of the trigger."[151] In addition, to prevent double counting of facilities, the Commission needs to make sure that a carrier may not be using "facilities owned or controlled by one of the other two providers on the premises [for loops]."[152]

Lastly, because the self-provisioning and wholesale triggers are separate and distinct, the Commission needs to recognize that if a ILEC demonstrates that a carrier satisfies the requirements for the self-provisioning trigger that does not mean that the CLEC automatically satisfies the wholesale trigger. The purpose of the self-provisioning trigger is to determine through actual experience whether similar situated CLECs feasibly can deploy their own facilities on a particular route. In contrast, the wholesale trigger examines whether the provider makes its facilities available to other carriers. Some wholesale carriers also may self-provide facilities to serve their own retail customers. However, other wholesale carriers may not provide any retail service and thus cannot be self-provisioners under the triggers. Obviously, if every

[151] *See TRO*, ¶ 333.

[152] *See TRO*, ¶ 333.

wholesale carrier was also counted as a "self-provisioner" solely by virtue of the fact that it owns facilities, it would eliminate the distinction between these two triggers.

B. Wholesale Triggers

First, the Commission should place the burden on the ILECs to demonstrate that the trigger has been satisfied and not make non-impairment determinations based on broad brush assumptions regarding what wholesale providers offer. The Commission should recognize that carriers may provide some wholesale services; however, they may not be in a position to offer the specific high capacity loop or transport services needed to fully satisfy the wholesale trigger being applied.[153] For example, a carrier may offer wholesale data or long distance voice services, and may also have established collocation arrangements for the self-provision of service to a specific retail customer. However, the fact that the carrier is a wholesale provider of an unrelated service is not relevant to the trigger analysis if the carrier is not offering wholesale services specific to its collocation arrangements. Further, a carrier that is a wholesale provider of high capacity loops or transport at the OC(n) capacity level would not necessarily offer on a "widely available" basis loops or transport at the DS1 or DS3 levels.

RBOCs in the state nine month *TRO* implementation proceedings generally relied on unverified data from GeoResults and GeoTel (and they still do[154]) which are third party market research firms. The GeoTel data purportedly reveals all the competitive fiber facilities that have been deployed, whereas GeoResults reveals which buildings are served by lit fiber of competing

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[153] *See On the Commission's Own Motion to facilitate the implementation of the Federal Communications Commission's Triennial Review determinations in Michigan*, Case No. U-13796, Administrative Law Judge's Notice of Proposal for Decision, at 31-33 & 43-46 (Mich. P.S.C. May 10, 2004) (finding that the competing carriers named by SBC do not satisfy the wholesale triggers needed for a non-impairment finding at the locations or on the routes that SBC identified).

[154] Verizon's July 2, 2004 Ex Parte Letter, attachment Declaration of Judy K Verses, Ronald H. Lataille, Marion C. Jordan, and Lynelle J. Reney, ¶¶ 9, 16-18, 20-30; SBC Aug. 18, 2004 *Ex Parte* Letter, at 3; Qwest Aug. 20, 2004 *Ex Parte* Letter, at 2.

carriers. Conspicuously missing from this information is whether such facilities are used to provide services on a wholesale basis at the relevant capacity level or criteria needed to determine if the wholesale triggers have been satisfied.

Notably, for example, in the Illinois nine-month Triennial Review Implementation proceeding, SBC blindly relied on GeoResults' information regarding which buildings had competitive lit fiber and did not confirm the accuracy of that information with the identified competitive providers.[155] Nor did SBC confirm with the competitive providers what the relevant capacity levels for a building were or if the buildings met other aspects of the Commission's rules established for the triggers such as operational readiness, ownership of facilities, and access to the entire building. Because of this, many of the buildings or carriers identified by GeoResults conflicted with the carriers own data. For example, GeoResults indicated that there were six buildings to which MCI purportedly provides facilities, but those six buildings do not appear on the list of buildings that MCI asserted its facilities serve, and that list was provided in response to SBC's first set of discovery well in advance of the date on which SBC circulated its direct testimony in that proceeding. Despite having in its possession information that contradicted the GeoResults claims, SBC included the GeoResults information in its triggering analysis.[156] The unsubstantiated data provided by GeoResults and GeoTel should not be afforded any weight when considering whether the triggers have been satisfied.

Second, ILECs must prove that each loop at the relevant capacity level (which is being considered under the wholesale trigger) terminates at a location that affords alternative providers access to the entire customer premises – including, in multi-tenant buildings, access to the same

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[155] *Implementation of the Federal Communications Commission's Triennial Review Order with respect to Local Loops and Dedicated Transport*, Illinois Commerce Comm. Docket No. 03-0596, Direct Testimony of Gary J. Ball at 17 (Jan. 14, 2004).

[156] *Id*.

common space, house, and riser, and other intra-building wire as the ILEC enjoys.[157] If a loop does not provide alternative providers with access to the entire customer premises, then the carrier providing the loop should not be counted for purposes of satisfying the loop wholesale triggers because, without access to the entire customer premises, that carrier is not truly offering an alternative wholesale service for loops. ILECs need to provide the Commission with evidence that with respect to the high capacity loop in question. As an example, alternative providers may offer a connection through a collocation arrangement in an ILEC central office. Competitors must be able to connect to that alternative provider's wholesale DS1 loop via another carrier's transport, with their own collocated facilities, or with ILEC UNE transport.

Third, before the Commission concludes that a high capacity loop wholesale trigger has been satisfied, an ILEC must prove to the Commission that the wholesale provider is operationally ready and willing to specifically provide high capacity transport to other carriers.[158] At a minimum, ILEC must show that each wholesale provider: Has sufficient systems, methods and procedures for pre-ordering, ordering, provisioning, maintenance and repair, and billing; Possesses the ability to actually provision wholesale high-capacity loops to each specific customer location identified or to provide dedicated transport along the identified route; For loops, has access to an entire multi-unit customer premises; Is capable of providing transport at a comparable level of capacity, quality, and reliability as that provided by the ILEC; for transport, is collocated in each central office at the end point of each transport route; Has the ability to provide wholesale high capacity loops and transport in reasonably foreseeable quantities, including having reasonable quantities of additional, currently installed capacity; Reasonably can be expected to provide wholesale loop and transport capacity on a going-forward basis; and can

[157] 47 C.F.R. § 51.319(a)(4)((ii)(B); *TRO*, ¶ 337.

[158] *TRO*, ¶¶ 338 & 414; 47 C.F.R. § 51.319(e)(1)(ii)(A).

provide service in a commercially reasonable timeframe, because if it takes to long to receive service customers will not sign up with CLECs.

Fourth, ILECs must fully demonstrate that the alternative providers offer their high capacity services on a widely available basis at the relevant capacity level.[159] Such evidence must demonstrate that the services are made available on a common carrier basis, for example, through a tariff or standard contract and not via an offer to negotiate an individualized private carriage contract. In addition, each carrier identified as a wholesale provider must be able "immediately to provide" wholesale service. 47 C.F.R. § 51.319(e). If the carrier is required to construct facilities in order for the service to be made available, the Commission should deem that the service is not widely available.

Finally, before a high capacity loop or transport wholesale triggers are deemed satisfied, the Commission should have evidence that CLECs have reasonable access to the wholesale provider. For instance, requesting carriers must be able to access cross-connects at nondiscriminatory rates, terms, and conditions in accordance with FCC and state commission rules. In addition, ILECs must provide requesting carriers with adequate cross-connect terminations at cost-based rates, and must enable sufficient capacity expansion. If carriers are not able to cross connect at the SBC central office, then they cannot obtain access to the wholesale providers' facilities.

VII. THE PROPOSED TRANSITION MECHANISM SHOULD BE MODIFIED

A. Dark Fiber, Due to its Unique Characteristics and Benefits, Cannot Be Transitioned in a Six Month Period

The *Interim UNE Order* correctly recognized a need for a transition period following the 'interim period' (*i.e.*, the six months following the expiration of the interim requirements on the

[159] *TRO*, ¶¶ 337, 414; 47 C.F.R. §§ 51.319(a)(4)(ii)(A), 51.319(e)(1)(ii)(B).

earlier of six months after Federal Register publication of the *UNE Interim Order* or the effective date of the Commission's final unbundling rules), whereby in the absence of a Commission finding that switching, dedicated transport, and/or enterprise market loops must be made available pursuant to section 251(c)(3) in any particular case, ILECs must continue providing CLECs with access to these UNEs at TELRIC pricing.[160] The Commission's reasoning for creating this transition period is to guard '[a]gainst the precipitous rate increases that might otherwise result.'[161] However, the Commission arbitrarily proposed to set this transition period at 6 months for all UNEs.

In final rules, instead of this undifferentiated approach, the Commission should establish transition periods for each UNE as appropriate. For example, more time will be required for CLECs to substitute alternative dark fiber providers than for other UNEs because there is no tariffed product a CLEC can use to avoid disconnection of its UNE dark fiber.

As discussed throughout these comments, dark fiber is a unique element. Of course, one reason it is unique is because the ILECs make it available only as a UNE, and not a tariffed product. It is also unique because in order to use it a carrier must deploy sophisticated and costly optronic equipment to breathe life into the dark fiber and actually provide telecommunications service. To the extent the Commission develops a transition policy for migration off of unbundled dark fiber on a route, that transition (1) must not force competitors to abandon capital investments made in optronics and other network equipment that allows the network to function and (2) should not require the CLEC to surrender its facilities-based model of operating its own network with innovative and unique services and be forced to simply resell ILEC lit services.

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[160] *UNE Interim Order* at ¶ 29.

[161] *Id.*

As set forth further below, transitioning to self-deployed fiber is, without a doubt, the UNE transition that will require the longest amount of transition time. The time necessarily follows the enormity of the task; namely, at times, trenching across tens of miles of city streets, sometimes facing street cut moratoria, sometimes facing weather delays, but always facing the natural construction hindrances of time and capital.

Arguably, there are certain scenarios that could mitigate the long, costly and complex process of self deploying new fiber facilities, including acquiring of rights of way, building access and other approvals that plague competitive deployment of fiber. Even when the transition is to a third party wholesale fiber provider, however, there is a need for a reasonable amount of additional time. First, as discussed in the declaration of Mssrs. Maella and Galvan, Alpheus is frequently required to build laterals in order to connect to third party fiber. Sometimes this construction will take place from an SBC manhole to a third party manhole. In other cases the alternative fiber provider may have limited fiber available and Alpheus would have to convert that route from a "thick" fiber network to a "thin" fiber network. This involves reconfiguring optronics, placing additional electronics into collocation arrangements or perhaps adding DWDM. None of these steps is simple or cheap. Each step requires significant planning and capital expense neither of which is well suited for a compressed twelve-month timeframe.

The most efficient and least disruptive manner in which to self-provision new fiber is to pull that fiber through existing duct. For dedicated transport the ILEC is usual the owner of the duct between its central offices. Thus the ILEC knows where the duct is located, what facilities are already in the duct, where duct is collapsed, where duct is blocked and where abandoned cable blocks duct.[162] As explained in the attached declaration the process of identifying, locating

[162] Alpheus Decl. ¶ 68-72.

and securing available duct and then pulling fiber through that duct is a time and capital intensive process. It cannot be performed overnight and considerable cooperation is required from the ILEC. But because pulling fiber through duct allows new fiber deployment without significant disruption to city streets, the Commission should make it the centerpiece of any discussion regarding transition from using UNE dark fiber.

1. Two Step Transition for Dark fiber

Based on the principles discussed above Alpheus proposes the Commission adopt the following transition model for UNE dark fiber on any route where no impairment is found.

- Given the physical realities of deploying fiber, including at times excavating miles and miles of city streets, the default transition from UNE dark fiber is 48 Months from a finding of non-impairment.
- The ILEC may shorten this transition period by, consistent with its Pole Act obligations, cooperating and providing duct, rodded, roped and ready for the CLEC to pull its own fiber. In such event, the transition would be 12 months from the tendering of the ready duct by the ILEC. Given that the ILEC's have this information readily available, they will in most instances be able to effectuate the 12 months transition period, if they choose.

As discussed above this transition period is justifiable because of the unique characteristics of UNE dark fiber. While certain characteristics of dark fiber justify unbundling it because of the benefits to facilities based competition, those same characteristics make it significantly more complex to transition from, especially when the transition requires self-provisioning where no alternative supplier exists.

The Commission's observation in the *TRO*, that "constructing local loops takes between 6-9 months"[163] is inconsistent with Alpheus own experience,[164] and that of other carries such as AT&T. Rather as Alpheus has proposed, the twelve-month transition when the ILEC delivers

[163] *TRO* ¶ 304.

[164] Alpheus Decl. ¶ 39-44, 118.

rodded, roped and ready duct represents a more realistic estimate of the time needed to deploy because "under ideal conditions it takes a minimum of twelve months for a facility to become 'revenue ready.'"[165] As demonstrated in the extensive declaration of Mssrs. Maella and Galvan, the physical reality of deploying new, redundant fiber duplicating the ILEC fiber is enormously costly and time intensive. Indeed, just to pull CLEC owned fiber through ILEC duct takes an extensive amount of work and process time.[166] As ALTS explained in great detail in its comments:

> The steps that a CLEC must take and issues that must be addressed, most of which require action by the ILEC, in order to replace UNE dark fiber with the CLEC's own fiber deployment include: Route Design Pole and Conduit Applications to appropriate destinations (BOC, power, cable); Pole and Conduit License and Attachment agreements; Pole and Conduit Surveys then Phase 1, 2, and 3 make ready (conduit, rod/rope/slug (RRS), pull inner duct); poles make ready/replacement/moves; Augment all collocation to have CATT vault access; License from Collocation space to CATT to Manhole Zero to diverse route entries; License and Notice for Manhole/handhole breakout (including road construction, directional drilling, and riser pole ducting); Right of way receipt for underground dig/deployment; Splice pedestal/enclosure, building entry, and demark access and agreements; Conduit placement agreements; Any municipal permitting and supervision; Actual installation of cable once everything else completed (dependent upon inventory and labor availability); Restrictions on deployment due to seasons (cold areas), building moratoria, municipal refusal to close roads or allow new deployment over highways or bridges.[167]

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[165] Reply Comments of AT&T, CC Dkt. No. 96-98, Declaration of Anthony Fea and William Taggart III, , ex. C, at ¶ 18 (filed April 30, 2001).

[166] Alpheus Decl. ¶¶ 63-88.

[167] ALTS Comments at p. 70 n. 118.

Of course, with significant distance (such as with transport routes) and with numerous manholes, this process can take years.[168] Importantly, this process assumes access to pre-existing, buried telecom duct.

Should duct not be available, the CLEC will be required to deploy duct from scratch and trench city streets across the route. The CLEC will then construct its own conduit route, in a substantially similar path to the ILEC conduit, so that it can then deploy its own fiber, in a manner redundant to the ILEC and access collocated CLECs that aggregate traffic at the SBC wire center. When the CLEC must self-provision dark fiber, especially on multiple transport routes in multiple metropolitan areas, the expense and burdens normally associated with deploying fiber are increased exponentially.[169]

The process for deploying fiber is the same whether the carrier is building a loop or a transport route. When building a loop it is possible that the CLEC could extend a lateral from an existing fiber ring, assuming one is available, or build an entire new run of fiber from the customer premises back to the collocation arrangement at an ILEC CO or to another point on the CLEC network. However, building laterals frequently require the same expenditures of time and capital required for building other fiber facilities.[170] The Commission's transition rules cannot simply assume a short lateral, as sometime CLECs must extend lateral a significant distance to even get to the closest splice point.[171] Even where the lateral is close to an existing splice point, placing fiber still requires a building access agreement, permits for constructing in the right-of-

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168 Alpheus Decl ¶ 40-43.

169 Alpheus Decl. ¶¶ 40-43, 77.

170 Alpheus Decl ¶¶ 58-60, 99.

171 *Id* at 99.

way, coordination with other utilities using the same right-of-way, installation, splicing, testing and turning up of the fiber.[172]

Deploying duplicative dedicated transport facilities to replace existing ILEC dark fiber UNEs faces similar obstacles but they are magnified significantly. First, in Texas, the routes between SBC central offices are significant distances. Thus this increases the cost as contractors that provide commercial fiber construction services price their services on a per foot basis, as do the suppliers that produce the fiber and conduit.[173] Further, construction of new transport facilities typically requires obtaining permits and licenses for multiple jurisdictions.[174] Each of these municipalities has its own separate rules for trenching in the public rights-of-way, and all those permits must be paid for and secured before construction can begin. With longer distances between ILEC central offices it is also likely that the CLEC will require permits to construct around or under railroad tracks and bridges, highways and in some cites such as Dallas and San Antonio, rivers. This adds additional layers to the review as permits must be obtained from the state and or federal entities that protect and operate these public resources. In addition to simply obtaining the permits, coordination increases delay and results in higher costs as well when one government entity requires a change in the routing that impacts on another government agency or municipality.

Nor can the Commission expect that the process takes less time when the CLEC is using ILEC conduit. Unless the ILEC has taken steps to review its records and locate available duct, and prepare that duct, making sure it is not collapsed or blocked by abandoned cables, the CLEC

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172 *Id.* at 41-42.

173 Alpheus Decl. ¶ 56 n. 8.

174 Alpheus Decl ¶ 119.

must undertake this process which is a painstaking, time consuming process that requires manual review of paper records and physical and visual inspection of every manhole on the duct route.[175]

In order to use ILEC duct between central offices, the CLEC must first identify the route on which the ILEC has deployed the duct by reviewing the ILEC's conduit and duct records.[176] This stage of acquiring use of ILEC duct itself takes "many months."[177] Once the duct has been located, the CLEC must determine whether it is available for use. Although duct may appear available in the ILEC records, those records do not necessarily show where duct is blocked by mud, collapsed duct tile or abandoned cable.[178] Then in order to prepare and submit an application to occupy the duct, the CLEC must provide detailed drawings of the duct in each manhole along the route to identify which duct it intends to use. This is a manual process which requires sending engineers to each manhole to review the existing placement of cables and use of the duct and typically takes 1-2 months per route.[179] Once the application is approved, the CLEC then applies to SBC for permission for "rodding of the duct," which is where technicians use a rodding tool, akin to a plumbers snake, to break up blockages of mud and other debris inside the duct.[180] Additional time is then required to pull the fiber, install, test and engineer the equipment. Lastly, the transition to owned fiber requires a painstaking process of rolling existing traffic to new fiber system.[181]

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[175] Alpheus Decl.¶ 68-72.

[176] Alpheus Decl. ¶ 75

[177] *Id*. ¶ 72.

[178] *Id*. ¶¶ 80-83.

[179] *Id*. ¶ 85, 87.

[180] *Id*. ¶ 88. If rodding is unsuccessful, carriers use a power washing too that sprays powerful streams of water into the duct to clear blockages. Power washing is much more expensive method of clearing blocked duct. *Id*. ¶ 88.

[181] Alpheus Decl. ¶ 84, 86.

2. A Multi-Year Term Transition is Consistent with Legal Precedent

The TRO and the review by the D.C. Circuit provide guidance that a multi-year transition period is consistent with the unbundling provisions, and the Commission's other powers under the Act. First, the Commission adopted a multi-year transition for line sharing in the *TRO*, that was not disturbed by USTA II.[182] Further, the Courts' review of the Commission's mass market switching impairment framework in the *TRO* does not impact the legality of the dark fiber transition framework proposed herein.

The Line sharing transition comparison shows that a multi-year transition period is justified for UNE dark fiber. With respect to line sharing, the Commission observed that "carrier have built internal systems to order the HFPL from incumbent LECs and have designed products that depend on line sharing as an input."[183] The same description can be made regarding Alpheus and others that employ UNE dark fiber: Alpheus has expended vast amounts of capital to deploy optronics, collocation, internal provisioning systems, network maintenance and monitoring capabilities, all based on the use of UNE dark fiber.[184] Further, Alpheus has deployed DWDM equipment that allows it to provide services over a network that depends on dark fiber as an input.[185]

Given that the Commission afforded line CLECs that employ line sharing UNEs three years to "implement new internal processes and procedures" and "design new product offerings" CLECs using dark fiber should be afforded the same capability. On the other hand if a three year period for line sharing was reasonable, a four year transition period for dark fiber is reasonable,

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182 *See* 47 C.F.R. § 51.319(a)(1)(i)(A)-(B).

183 *TRO*, ¶ 264.

184 Alpheus Decl. ¶¶ 10-13, 15-17.

185 *Id*.

considering the additional requirements of physical construction associated with self-provisioning fiber. While the Commission's line sharing impairment determination was based on the belief that CLECs could use line splitting or a stand alone loop rather than the HFPL, the CLEC still retained access to the whole loop element rather than the a part of it. For dark fiber, CLECs do not have an element that could possibly be considered a substitute.[186]

As was the Line Sharing transition rule, allowing unbundling to continue for 48 months is a "rational rule" accompanied by a "safety valve" namely the ability to shorten the unbundling obligation once the CLEC has been provided duct ready for use. As discussed immediately above, the rule allowing a transition of up to 48 months is rational even where a determination of no impairment is made because the complexity, capital investment, and time necessary to self-provision new fiber facilities if ILEC duct is not available. The dark fiber transition mechanism further recognizes the inherent difficulties for CLECs in locating and securing available duct without cooperation from the ILEC. Thus, because the decision rests with the ILEC, whether to cooperate and assist the CLEC in migrating off of the ILEC fiber or not, the rule should survive scrutiny.

3. ILECs Should Not Be Allowed to Stop Provisioning New Orders During The Transition Period

Regardless of which transition proposal the adopts in this proceeding, it should clearly provide that ILECs must provision new orders at TELRIC prices during the transition period. It stands to reason that if it is reasonable to afford CLECs a sufficient transition period for a UNE then it is reasonable to assume that they could serve new customers without the UNE only after the transition period has expired. This will not impose a significant burden on ILECs especially

[186] *See e.g. TRO* ¶ 381 (finding that lit transport is not a substitute for dark fiber transport.)

given that TELRIC pricing would terminate at the end of the transition period. This will also mitigate the rate shock that could be suffered by competitive LECs' if required to pay non-cost-based prior to when they can reasonably be expected to have implemented non-UNE provisioning alternatives.[187] Accordingly, Alpheus urges the Commission to clarify that ILECs are required during the transition period to provision new orders as UNEs.

VIII. THERE IS NO SPECIAL ACCESS SUBSTITUTE FOR DARK FIBER

The D.C. Circuit vacated the FCC's impairment analysis for dedicated transport in part because the Court determined that the FCC did not properly consider the availability of ILEC special access tariffs in conducting the impairment inquiry.[188] Regardless of how the Commission weighs the ILEC special access offerings in its impairment analysis for lit services; the lack of ILEC dark fiber tariff offerings demonstrate that CLECs should continue to be able to obtain unbundled dark fiber.[189]

With unbundled dark fiber, it cannot be said that "competitors have access to necessary inputs at rates that allow competition to flourish" because competitors have no access to dark fiber at any rate other than through "mandatory unbundling."[190] As the Court suggests, the purpose of the Act "is to stimulate competition—preferably genuine, facilities-based competition."[191] Thus the stated purpose of the Act and the lack of available ILEC special access alternatives require that the Commission mandate the unbundling of dark fiber where

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[187] *See UNE Interim Order* ¶ 30.

[188] *USTA II*, 359 F.3d at 576.

CLECs are unable to economically self provision or obtain alternative facilities from third parties.

IX. ENTRANCE FACILITIES SHOULD BE CONSIDERED A SEPARATE UNE FROM DEDICATED TRANSPORT

USTA II properly remanded to the FCC how to resolve the Commission's unlawful determination that entrance facilities were not "network elements" as defined under the Act.[192] In doing so, the court suggested that the Commission required a more fully developed record regarding: 1) the definition of the entrance facility element; 2) the reasons ILECs have traditionally supplied other carriers with entrance facilities and 3) an analysis of whether requesting carriers are impaired without access to entrance facilities. We respectfully explain below that the Commission cannot circumvent the logical conclusion that entrance facilities are a network element as defined in the Act; that the element is distinct from dedicated interoffice transport as the FCC found in the *TRO* and thus should be defined as part of a separate element, not as part of dedicated transport, and that many carriers remain impaired without access to entrance facilities, particularly dark fiber, DS1 and DS3 level facilities.

A. There Is No Statutory Basis For Finding That Entrance Facilities Are Not A Network Element.

The D.C. Circuit remanded sections of the *TRO* that found that entrance facilities were not a network element. The definition of network element set forth in the Act is plain: "a facility or equipment used in the provision of a telecommunications service." In the *TRO* the Commission determined that "the Act does not require incumbent LECs to unbundled transmission facilities connecting incumbent LEC networks to competitive LEC networks for the

[192] *USTA II*, 359 F.3d at 586.

purpose of backhauling traffic."[193] As CLECs explained before the D.C. Circuit, however, the Act does not permit the Commission to reach that conclusion without undertaking the "touchstone" impairment analysis required under §251(d)(2)(B).

The only justification the Commission offered to the DC Circuit was an explanation that it had "based its new definition of dedicated transport on a reasonable conclusion that Congress in section 251(c)(3) intended the 'network' to include only those facilities that are within the ILECs' own telecommunications network."[194] The Commission could not and did not respond to the CLEC contention on appeal that the *TRO* unlawfully found that entrance facilities were no longer network elements. The plain language of the definition of network element is inescapable: entrance facilities, because they are undoubtedly "facilities" and they are undoubtedly used in the provision of "telecommunications service."

However, the Commission's conclusion that entrance facilities are not part of the incumbent LEC's dedicated interoffice transport network is reasonable, as long as entrance facilities are subject to the Commission's mandatory impairment analysis required under 251(d)(2)(B).[195]

B. Entrance Facilities Should be Considered a Separate Network Element apart from Dedicated Transport.

1. The *TRO* Provides a Justification for Analyzing Impairment for Entrance Facilities Separately from Dedicated Transport.

As the Commission explained in the *TRO*, entrance facilities "are not inherently a part of the incumbent LEC's local network. Rather they are transmission facilities that exist *outside* the

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[193] *TRO*, ¶ 365.

[194] Brief of Respondent FCC, *USTA v. FCC*, D.C. Cir. No. 00-0012, p. 81-82 filed Dec. 31, 2003.

[195] *See* 47 U.S.C. § 252(d)(2)(B) (the FCC "shall" consider impairment.)

incumbent LEC's local network."[196] While this reasoning does not overcome the plain language of the definition of network element and the requirement that the Commission conduct an impairment analysis, it does warrant conducting an impairment analysis distinct from that applied to the dedicated transport element, which the Commission explained is different because interoffice transport facilities "are an inherent part of the incumbent LEC's local network."[197]

The *TRO* further explains why a distinct impairment analysis is warranted. As the Commission explained, the economics of dedicated transport are "sufficiently different" from entrance facilities. In certain cases CLECs "have control over where to locate their network facilities to minimize self deployment costs' and that control … is lacking with respect to [dedicated] transport."[198] The Commission also found that entrance facilities "often represent[] the point of greatest aggregation of traffic in a competing carrier's network and such carriers are more likely to self-deploy these facilities because of the cost savings such aggregation permits." While the granular impairment test Alpheus proposes elsewhere in these comments will analyze these factors in the context of an impairment inquiry, the Commission's reasonable conclusions in the *TRO* indicate that entrance facilities should be subject to a separate impairment inquiry from dedicated transport.

2. Evidence Presented by the ILECs Also Suggests a Separate Impairment Analysis for Dedicated Transport is Warranted.

Evidence presented by the ILECs in the state proceedings applying the Commission *TRO* triggers for dedicated transport further buttress the conclusion that the Commission should consider the impairment inquiry for entrance facilities separate from that for dedicated transport.

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196 *TRO*, ¶ 366.

197 *TRO*, ¶ 366.

198 *TRO*, ¶ 367.

In these cases the ILECs supplied evidence that CLECs had extensively supplied their own fiber to connect their switches or POPs to the ILEC network for backhauling traffic from the ILEC network to the CLEC switch or POP.

In Texas for example, CLECs provided evidence that although they deployed fiber transmission facilities between their switch and an incumbent LEC central office, CLEC networks were not designed, deployed or configured to carry traffic between ILEC central offices.[199] Evidence in the Texas proceeding further suggested that CLECs typically deploy their networks using a hub and spoke arrangement. In such an arrangement the CLEC switch or POP serves as the hub and is connected to at least one ILEC central office where the CLEC is collocated. The CLEC then aggregates its traffic from other central offices where the carrier has customers and brings that traffic back to the ILEC central office where it is collocated and then sends that traffic over the entrance facility to its own switch or POP. In the case of carrier providing switched voice service, individual local calls are then transmitted to other carriers (including the ILEC) through interconnection trunks. Data carriers providing xDSL service will carry traffic from their local POP to their internet backbone to carry internet traffic to their destination. These examples further support CLEC submissions to the Commission in the Triennial Review that entrance facilities are the most competitive link in the network.[200] Importantly, this impairment review, which is distinct from that of interoffice transport, should be performed independently to determine which routes show impairment and which do not.

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[199] Impairment Analysis for Dedicated Transport, Docket 28744, Brief of CLEC Coalition *et al.*, at 22-23, filed May 7, 2004.

[200] *TRO*, ¶ 367 n.1122.

a. If Not Treated As An Independent Element, Entrance Facilities Should be Part of Either the Transport or Loop Element.

As discussed above, *USTA II* requires that the Commission conduct an impairment analyses for entrance facilities because they are network elements as defined in the Act. If the Commission declines to conduct a "stand-alone" analysis of impairment for the entrance facility element, it should include the entrance facility element as either dedicated transport or the loop element.

To a certain extent, the entrance facility more closely resembles a loop than dedicated transport. Under the RBOC special access tariffs for example they are treated identically: both elements are channel terminations. The rates for these elements are fixed and do not vary based on the mileage of the two end points of the facility unlike dedicated transport which is a distance sensitive element.[201]

SBC, for example recognizes that loops and entrance facilities are similar elements. In TELRIC rate proceeding before the Texas PUC, SBC witnesses testified that the only difference between an entrance facility and a loop was the size of the multiplexing equipment used to "light" the fiber and transmit telecommunications over the facility.[202]

C. Entrance Facilities Have Traditionally Been Provided By ILECs and Other Carriers And Are, Therefore, Part of Their Network.

In remanding the Commission's unlawful determination that entrance facilities are not network elements, the D.C. Circuit suggested that the Triennial Review record lacked an adequate explanation of how and by whom entrance facilities have traditionally been deployed.

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[201] UNE Dark fiber is the exception as fiber loops are typically priced on a distance sensitive basis, while DS1 and DS3 loops, like channel terminations are not priced based on the actual length of the facility.

[202] *Petition of Waller Creek Communications, Inc. for Post-Interconnection Agreement Dispute Resolution with Southwestern Bell Telephone*, Docket 20268, Tex. P.U.C. Direct Testimony of M. Schilling at p. 16, filed Jan 19, 2001.

As explained below, Alpheus shows that ILECs have traditionally supplied telecommunications carriers with entrance facilities under special access tariffs. ILECs offered thee services after divestiture in order to provide IXCs with access to their network. In order to remedy anti-competitive practices, the FCC subsequently required ILECs to provide entrance facilities to special access customers including competitive carriers regardless of other special access services the carrier or customer obtained. Thus it is clear that provision of entrance facilities by the ILECs has long been the practice and benefits the incumbent as well as the new entrant. Although typically it is the new entrant that has the stronger desire to connect to the ILEC network, the principle of network effects suggests that the ILEC has an incentive to permit such connections as well. In addition the Act obligates all telecommunications carriers to directly or indirectly connect to other carriers.[203]

D. The Definition of the Entrance Facility Element Should be Competitively and Technology Neutral

The Commission's definition of entrance facility should be made clear to avoid costly disputes and promote consistency across the states. In the past the Commission's definition of entrance facility was a transmission facility between an ILEC switch or wire center and a CLEC switch or wire center. Numerous ILECs have interpreted this definition to preclude carriers from obtaining entrance facilities where there is no switch at the CLEC POP, asserting that the terms "wire center" is synonymous with switch. Although it is obvious that the term wire center and the term switch as used in the definition cannot both mean switch under standard legal principles of sentence construction, the Commission should clarify its definition to preclude further distortion by incumbent LECs.

[203] 47 U.S.C. § 251(a)(1).

In addition to being unduly susceptible to manipulation by the ILECs, the Commission's previous definition of entrance facility was not technology neutral. By referring to switches and wire centers the definition of entrance facility arguably excluded carrier locations of carriers that provide non-switched services, particularly data services such as xDSL. As discussed above xDSL carriers aggregate traffic form xDSL loops at a collocation arrangement at an ILEC wire center and then carry that traffic to a POP or hub where that traffic is then carried to the Internet. It makes no sense, and would conflict with the Commission's long standing policy of ensuring that its unbundling regulations are technology neutral for the Commission to arbitrarily exclude data carriers or other carrier locations from the definition of the entrance facility network element.

That definition should simply specify that an entrance facility is a transmission facility dedicated to a single customer or carrier between an ILEC switch or wire center and a requesting carrier location including but not limited to a switch, wire center, hub or POP. This definition will provide requesting carriers certainty that where they are impaired without access to such facilities the ILEC will provision the element and that carriers that provide services that do not employ switching will have the same right to access such elements as those providing switched services.

E. CLECs Are Impaired Without Access To Entrance Facilities and the Commission Should Apply Triggers to the Extent They are Applied to High Capacity Loops.

As it did in the *Triennial Review*, the Commission should assess competitive carrier impairment for the entrance facility element based on the capacity needs along particular routes. Similar to the rules adopted (and not challenged) in the *TRO* that CLECs are not impaired without access to OCn loops or dedicated transport, the Commission should find that CLECs are

not impaired without access to OCn entrance facilities. To the extent that a carrier requires other capacity entrance facilities the same rules applicable to high capacity loops should apply. First, the Commission should find that CLECs are impaired without access to DS1 entrance facilities. As the Commission acknowledged in the *TRO* there is simply no evidence demonstrating that carriers have overcome the barriers to entry that make self provisioning economic or that wholesale entrance facilities are available in the competitive marketplace. At the level of DS1, CLECs are most certainly limited to one and only choice—obtain service from the incumbent LEC.[204]

Access to entrance facilities at other capacity levels should be treated similarly to the Commission's rules for loop unbundling of DS3 and dark fiber loops. Such treatment is justified because in many instances the building access issues are similar in that many carrier POPs are located in commercial office buildings.[205]

As for DS3 loops, there should be a limit to the number of loops a CLEC could obtain as an entrance facility to a particular building. As with DS3 loops, the limit should be established at two DS3 loops. If the carrier is adding a third DS3 than it is presumed to be no longer impaired without access to the combined functionality of the ILECs fiber transmission and multiplexing capacity. The CLEC may be entitled to access a dark fiber entrance facility and invest in the equipment to light that fiber but the carrier is no longer able to obtain DS3 entrance facilities to that building.

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[204] As explained above the incumbent LEC has provided entrance facilities under tariff due to the legal regime instated after the divestiture of the Bell System.

[205] *See* Alpheus Decl. ¶ *33.*

X. ALL TELECOMMUNICATIONS SERVICES "QUALIFY" A CARRIER FOR UNE ACCESS UNLESS THE COMMISSION DETERMINES THAT THE REQUESTING CARRIER IS NOT IMPAIRED WITH RESPECT TO SUCH SERVICE.

Section 251(d)(2) requires the Commission to provide unbundled access to elements where the lack of such an element "would impair the ability of the telecommunications carrier seeking access to provide the *services* it seeks to offer."[206] *USTA II* makes clear that the Commission cannot interpret the term "services" to limit UNE eligibility to providers of certain "qualifying telecommunications services" without first making a non-impairment determination for each particular type of service that is proposed for exclusion. The court found that "long distance services or other telecommunications services that do not compete directly with core ILEC services" "clearly fall within the plain meaning of" the term services in section 251(d)(2).[207] The Commission is therefore barred from readopting the determination in the *TRO* that limited the use of UNEs to CLECs that provided a "qualifying" service, which it defined as "those telecommunications services offered by requesting carriers in competition with those telecommunications services that have been traditionally the exclusive or primary domain of incumbent LECs."[208] Certain services may ultimately be deemed not to qualify a requesting carrier for UNE access, but only if the Commission finds that requesting carriers are not impaired with respect to that service.[209]

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[208] *TRO*, ¶ 135. While the *TRO* would have permitted CLECs to also offer other services over the UNE, they were required to provide at least one qualifying service on a common carrier basis over each UNE. *TRO*, ¶¶ 143-149. The Commission based these restrictions, not on any determination of non-impairment for non-"qualifying" services, but upon an interpretation that the Act intended or permitted such exclusion. *TRO*, ¶¶ 137-139, 141.

Next, the Commission can and should reaffirm its finding in the *TRO* that "once a requesting carrier has obtained access to a UNE to provide a qualifying service … the carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services."[210] The Commission found that this approach represented the optimal balancing of the costs and benefits of unbundling, since "once the Commission has determined to impose "the costs associated with mandatory unbundling" upon an incumbent LEC, it would be wasteful for the network element not to be put to its maximum use."[211] Alpheus urges the Commission not to weaken section 51.100(b) of its rules. As the *TRO* noted, CLECs need the flexibility to provide multiple services over UNEs to offer the types of bundled packages that consumers demand in order to be able to meaningfully compete against the incumbents, which aggressively market bundled services.[212]

Therefore, under *USTA II* and the Act, CLECs are entitled to obtain UNEs for any service where denial of the UNE would result in impairment. Next, under rule 51.100(b), a CLEC that is entitled to a UNE for one type of service may use the UNE for all services. The net result of these two principles is that the Commission may only exclude requesting carriers that would not be impaired with respect to *any* of the telecommunications services they seek to offer.

A. The Commission Can Make Service Specific Impairment Analysis

Although the D.C. Circuit clearly vacated the distinction created under the *TRO* between "qualifying and non-qualifying services, the Court provided the Commission with a roadmap for resolving the problem the qualifying service distinction sought to address. First, the Commission

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[210] *TRO*, ¶ 143.

[211] *TRO*, ¶ 143.

[212] *TRO*, ¶ 146.

could conceivably not distinguish between the services competitors are providing using the UNE, however the Court's treatment of Line Sharing in *USTA I*, and CMRS service in *USTA II* suggest that such a broad impairment inquiry would be looked upon unfavorably on appellate review. Thus, it may be preferable to divide its service by service impairment inquiry in two pieces: one for all services where requesting carriers use the element "to compete against those services that traditionally have been the exclusive domain of incumbent LECs" including, but not limited to "local exchange service, such as plain old telephone service, and access services, such as digital subscriber line devices and high capacity circuits."[213] and the second services that were not traditionally provided by the incumbents.

The Commission articulated a rational policy justification for this in the *TRO* claiming that the Commission's "impairment inquiry should center on those telecommunications services that competitors provide in direct competition with the incumbent LECs' core services."[214] The Commission was correct to read its interpretation of the Act as the most plausible to allow "the powerful tools made available through [§§ 251(c)(3) and 251(d)(2)] are focused on opening the bottleneck markets largely controlled by incumbent LECs."[215]

As noted above, the Commission's determinations regarding the requirement to use UNEs to provide a "telecommunications service" in ¶¶ 149- 153 were not disturbed by the Court's *vacatur* of the qualifying services distinction. Nonetheless, the Commission should reaffirm its conclusion that under the 1996 Act the presence of the term "telecommunications

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213 47 C.F.R. § 51.5; TRO ¶¶ 135, 140.

214 TRO ¶ 139.

215 *Id.*

service" in § 251(c)(3) requires that the requesting carrier use the UNE in providing a service on a common carrier basis.[216]

In short, the Commission should reaffirm that even in the Act's unbundling provisions, the definition of common carrier still requires application of the two part NARUC test. This test assess (1) whether the carrier holds himself out to serve indifferently all potential users"; and (2) whether the carrier allows customers to "transmit intelligence of their own design and choosing."[217]

Finally the Commission should emphasize the continuing validity of ¶ 153 of the TRO which explains that telecommunications services (common carrier services) "may be offered on a retail or wholesale basis."[218] The Commission correctly observed that "access services are wholesale offerings when sold to other carriers," and are "common carrier services when offered indifferently to all members of a particular class of customers."[219] Thus the Commission concluded that when a carrier serving all customers indifferently provided "an access service and made it available to other carriers for an input for their retail interexchange service, such access service would be a common carrier service."[220] Such a clarification bolsters the Commission's goal of fostering a vibrant wholesale market, which enables retail competition and product differentiation. The Commission has implicitly recognized that retail competition is illusory if all retailers must purchase the same products at the same prices from the same wholesale

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[216] *TRO* ¶ 150 *citing* 47 U.S.C. § 153(46) and *Virgin Islands Telephone Corporation v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

[217] *TRO* ¶ 152, *citing NARUC v. FCC*, 533 F.2d 601, 608-609 (D.C. Cir. 1976); *NARUC v. FCC*, 525 F.2d 630, 643 (D.C. Cir. 1976).

[218] *TRO* ¶ 153.

[219] *Id*.

[220] *TRO* ¶ 153.

supplier. In the Order it adopts in this proceeding, the Commission should reaffirm these principles to clearly emphasize that carriers may use UNEs to provide services, such as local exchange services or high capacity access services that compete against services historically dominated by the incumbent LEC.

XI. THE COMMISSION SHOULD RETAIN THE IMPAIRMENT STANDARD ADOPTED IN THE TRO APPLIED TO A REASONABLY EFFICIENT NEW ENTRANT

While *USTA II* may require some changes to the implementation of the *TRO*'s impairment standard, it does not require modification of the standard itself. That standard – whether lack of access to a network element would "pose[] an entry barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic"[221] – may therefore be reaffirmed and used in this proceeding.[222] However, the court indicated that the standard should be modified to specify "uneconomic by whom."[223] The Act itself provides the answer, but perhaps not an answer that will be acceptable to the panel that controls this case at the D.C. Circuit. The Act directs the Commission to consider the impairment of "the telecommunications carrier seeking access" to the ILEC networks.[224] So the impairment test should measure whether market entry would be uneconomic by each of these requesting carriers. This position finds additional support from the Supreme Court, which in *Verizon*, clearly posited that the Commission can and should distinguish smaller market entrants from established carriers.[225]

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[221] *Triennial Review Order* ¶ 84.

[222] *See generally USTA v. FCC*, 359 F.3d at 571-573.

[223] *USTA v. FCC*, 359 F.3d at 572.

[224] 47 U.S.C. § 251(d)(2)(B) (emphasis added).

[225] *Verizon*, at 510, n. 27.

In order to avoid additional judicial scrutiny on this point, the Commission could simply clarify that the economic test for impairment is to be measured in the context of a reasonably efficient competitor that does not own or control other network elements or rights-of-way. Reasonable efficiency, which was proposed by BellSouth in the Triennial Review proceeding,[226] is a logical and practical standard that should assure unbundling for the competitive carriers that can survive in a competitive market.[227] The Commission certainly should not adopt any narrower construct -- to limit UNE access to only the "hypothetically most efficient competitor" using only "the most efficient technology available" could result in unbundling available in theory but never in practice. Congress did not adopt the Act to engage the Commission in theoretical exercises – it adopted the Act "to promote competition,"[228] and it ordered the Commission to implement its unbundling regulations within six months so that such competition could be realized as quickly as possible.[229]

The economic test for impairment should not assume that the carrier already owns or controls a network or rights-of-way (i.e., the assets of another utility). Congress clearly intended market entry by new carriers that wished to enter the telecommunications market *without* an existing network already in hand – otherwise, Congress would not have needed to adopt the

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[226] See *TRO* ¶ 84, n. 275 (quoting BellSouth Reply at 12-13 ("Once the UNE market is properly defined, impairment should be tested by asking whether a reasonably efficient CLEC retains the ability to compete even without access to the UNE.")

[227] Thus, while based on the language of the Act this test would be under-inclusive by excluding inefficient carriers, as a practical matter the difference may not substantially effect consumers.

[228] Preamble, Telecommunications Act of 1996. The Commission previously noted in attempting to define impairment that this preamble "gives the best snapshot of Congress's overall intent in enacting the 1996 Act." Triennial Review Order at ¶ 70.

[229] 47 U.S.C. § 252(d)(1).

powerful mechanism of forced unbundling.[230] Companies that already have assets will generally not want to pay an ILEC any amount for duplicative facilities when they could use their own, while companies without such assets cannot reasonably be presumed to be capable of acquiring them simply because at least one other company has, regardless of its means of doing so.[231] Utility companies, such as cable and electric companies, have paid for their networks and obtained rights-of-way in substantial part through guaranteed profits from captive rate-payers and other advantages that are not now available to new entrants in the telecommunications market. Absent evidence that a reasonably efficient competitor without these advantages can economically enter the market without UNEs, access to UNEs cannot lawfully be denied on a generic basis simply because other companies not similarly situated may be able to enter the market without them.[232]

Therefore, in this proceeding, the Commission should find that impairment exists and order unbundling where lack of access would pose an entry barrier or barriers to entry, including operational and economic barriers that are likely to make entry into a market uneconomic by a reasonably efficient competitor, including those reasonably efficient competitors that do not own or control other network elements or rights-of-way.

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[230] The *TRO* recognized that the impairment test should consider the ability of a small, new company to enter the market. *See, e.g.*, TRO at ¶ 75, n. 248 (emphasizing that the ability of such companies to raise capital should be considered in determining impairment); TRO at ¶ 86 (considering length of time needed for new construction in its impairment analysis).

[231] See *TRO* n. 311 ("we do not presume that if one carrier can enter FONT the market without UNEs, there is no impairment."). See also TRO at ¶ 98 ("We may give less weight to intermodal alternatives that do not contribute to the creation of a wholesale market in accessing the customer or do not provide evidence that self-deployment of such access is possible to other entrants.")

[232] The proposed clarification would still permit the Commission to consider the ability of a company without these assets to obtain them other than through unbundling.

XII. SECTION 271 UNBUNDLING OBLIGATIONS CONTINUE TO APPLY

A. Dark Fiber Must Be Provided Under Both Loop And Transport Checklist Items

USTA II clearly establishes that the unbundling obligations under § 271 are "independent" of the unbundling obligations pursuant to §§251-52.[233] The Court specifically found that the RBOCS must provide the competitive check list items including items number 4 (loops) and number 5 (transport) "even in the absence of impairment." Thus under § 271, where specific loop or transport routes are subject to a finding of non-impairment, the Commission should make clear that the RBOCs must continue to provide dark fiber "even in the absence of impairment."[234] Because dark fiber loops fall within the definition of a loop in §271(c)(2)(B)(iv) and within the definition of transport under § 271(c)(2)(B)(v) and the corollary definitions under § 251, the Commission should make clear that the RBOCs § 271 obligations continue to apply to dark fiber.

B. States May Establish Pricing and Other Terms of Section 271 Unbundling, at a Minimum, Post-InterLATA Entry.

1. Just and Reasonable Pricing May Be Equivalent to TELRIC.

In the *Triennial Review Order*, the Commission found that section 271 of the Act imposed unbundling obligations separate from those of section 251 and that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."[235] Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Act empowered the Commission to adopt rules that implement the Act, the Commission held that the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Act should be applied

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233 *USTA II*, 359 F.3d at 588.

234 *See USTA II* at 588.

235 *TRO*, ¶ 656.

to § 271 UNEs. The Commission further held that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or enforcement action, whether the price for a particular 271 element met the section 201/202 standard.[236]

The Commission should take this opportunity to clarify its discussion of this issue by providing that although section 252(d) TELRIC pricing does not automatically apply to 271 unbundled network elements, neither does it preclude application of cost based rates under section 252(d). In fact, there is no theory or construction of the section 201(b) just and reasonable standard that would exclude a cost based (plus a reasonable profit) pricing standard. Indeed, cost-based is the traditional benchmark for reasonable prices. Therefore, the Commission should determine that section 201 just and reasonable pricing accommodates TELRIC pricing notwithstanding that other pricing may also qualify in some cases as just and reasonable.

2. State Commissions Have the Authority to Set Rates, Terms, and Conditions for 271 UNEs.

In a recent petition requesting preemption of the Tennessee Public Service Commission, incorporated by the Commission into the record of this proceeding, BellSouth has raised the issue of whether states may set pricing for section 271 network elements.[237] The Tennessee Public Service Commission in the context of an arbitration had determined the market price for section 271 network elements. For all the reasons stated by CLECs in comments on that petition, the Commission may not preempt the Tennessee commission.[238]

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[236] *TRO*, ¶ 664 aff'd *USTA II*, 359 F.3d at 589.

[237] *See BellSouth Emergency Petition for Declaratory Rule and Preemption of State Action*, Petition of BellSouth, Docket 04-245 (filed July 1, 2004).

[238] *See e.g., BellSouth Emergency Petition for Declaratory Rule and Preemption of State Action*, Comments of Cbeyond Communications, LLC, CTC Communications Corp., El Paso Networks, LLC, McLeod Telecommunications Services, and TDS Metrocom, LLC., Docket 04-245 (filed July 30, 2004), and Comments of AT&T (filed July 30, 2004).

To briefly reiterate those arguments here, however, the Communications Act of 1934 establishes "a system of dual state and federal regulation over telephone service,"[239] under which the Commission has the power to regulate "interstate and foreign commerce in wire and radio communication."[240] The Commission is generally forbidden from entering the field of intrastate communication service, which remains the province of the states.[241] Whether the Commission may preempt state regulation of intrastate telephone service depends, as in "any pre-emption analysis," on "whether Congress intended that federal regulation supersede state law."[242] The Supreme Court has found that the "best way" to determine if there is preemption "is to examine the nature and scope of the authority granted by Congress to the agency."[243] In cases involving the Communications Act, that inquiry is guided by the language of section 152(b),[244] which the Supreme Court has interpreted as "not only a substantive jurisdictional limitation on the Commission's power, but also a rule of statutory construction."[245] For instance, in applying this test in a challenge to the Commission's authority under section 276 of the Act, courts have held that special provisions concerning BOCs "should not be read to confer upon the FCC

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239 *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

240 47 U.S.C. § 151.

241 *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 360; *see also Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 561 (D.C. Cir. 1997); *see also City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1155 (D.C.Cir.1987) ("[T]he FCC enjoys jurisdiction over interstate rates, whereas the several States reign supreme over intrastate rates.").

242 *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369.

243 *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

244 Section 152(b) of the Communications Act provides,

> Except as provided in sections 223 through 227…, inclusive, and section 332 …, and subject to the provisions of section 301 of this title…, *nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to …charges, classifications, practices, services facilities, or regulations for or in connection with intrastate communications service….'*
> 47 U.S.C. § 152(b) (emphasis added).

245 *Id.* at 373.

jurisdiction" unless such provisions are "so *unambiguous or straightforward* so as to override the command of § 152(b)."[246]

In *New England Public Comm. Council v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) ("*New England Public Comm. Council*"), the Court found that section 276 "unambiguously and straightforwardly" grants the Commission the authority to regulate the BOCs' intrastate payphone line rates. In *New York & Public Service Com'n of New York v. FCC*, 267 F.3d 91, 102 (2nd Cir. 2001) ("*New York*"), the court held that section 251(e) grants the Commission authority to act with respect to those areas of intrastate service associated with the North American Numbering Plan and its administration.[247] The court found that this explicit grant of authority provides the requisite "unambiguous and straightforward" evidence of Congress's intent to override the command of § 152(b) that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction over intrastate service."[248]

Unlike sections 276(b) and 251(e) of the Act, section 271 does not "unambiguously and straightforwardly" grant the Commission the sole authority to establish rates, terms and conditions for 271 UNEs. While the Commission is entrusted with granting or denying section 271 applications, the Act is silent on who sets terms and conditions for section 271 unbundling after interLATA entry.

Nor does section 271 have a specific provision similar to 276(e) that expressly states that Commission regulations preempt inconsistent state commission decisions. Therefore, consistent with the *New England Public Comm. Council* and *New York* decisions, it would unlawful for the

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[246] *Illinois Pub. Telecomms. Ass'n*, 117 F.3d at 561 (emphasis added, internal quotation marks omitted) (citing *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 377).

[247] *New York*, 267 F.3d at 102 (citing 47 U.S.C. § 251(e)).

[248] *Id*. (quoting *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 377).

Commission to preempt state commissions from exercising their section 152(b) authority and regulate 271 UNEs because nothing in section 271 unambiguously and straightforwardly prohibits states from doing so.

If anything, section 261(c) of the Act specifically permits state commissions to exercise their intrastate authority in a manner that is consistent with the federal regulatory scheme. Section 261(c) specifically provides:

> (c) Additional State Requirements. - Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.[249]

With this authority, state commissions can further local telecommunications competition as section 271 contemplates and establish intrastate rules that track a BOC's obligations under section 271. Such authority includes ordering just and reasonable rates, terms, and conditions associated with offering 271 UNEs.

Furthermore, the United States Supreme Court's decision in *Iowa II* supports a determination that no preemption in this instance exists so long as state commissions apply the Commission's just and reasonable standard. Indeed, the Supreme Court found parallel federal and state jurisdiction under 252 and held that the Commission had the authority to create a pricing methodology that states would apply. In rendering this decision, the Supreme Court endorsed having state commissions continue playing their significant role in the ratemaking process.[250] The Supreme Court explained that "state commissions" participation in the

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[249] 47 U.S.C. § 261(c).

[250] *Iowa II*, 525 U.S. at 384.

administration of the new *federal* regime is to be guided by federal-agency regulations and that "States will be allowed to do there own thing", however, they must "hew" the lines drawn by the FCC or federal courts.[251]

For the above reasons, the Act and numerous judicial decisions support dual federal and state jurisdiction whereby state commissions apply the Commission's just and reasonable standard for 271 UNEs. Because of this, the Commission may not alter or disrupt this dual regulatory scheme.

3. Special Access Rates are Unreasonable.

Contrary to BOCs' allegations, there is basis for the Commission establishing special access pricing as *per se* not just and reasonable. As noted elsewhere in these comments, BOC special access offerings that have qualified for Phase II pricing flexibility are outside of price caps.[252] BOCs are additionally earning unconscionable rates-of-return on special access pricing.[253] Moreover, BOCs are raising prices showing that there is insufficient competition to constrain prices.[254] Therefore, far from assuming that special access pricing is reasonable, the Commission should reject BOC contentions on this point and promptly initiate a proceeding to reform its oversight of special access pricing.

XIII. CONCLUSION

Alpheus request that the Commission conclude this proceeding, in accordance with the recommendations proposed in these Comments, at the earliest possible date.

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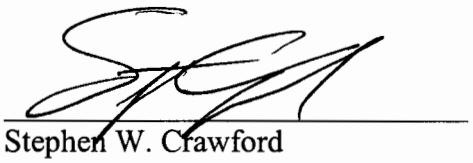
[251] *Id*., 525 U.S. at 378 n.6.

[252] *Pricing Flexibility Order* at ¶ 69.

[253] See Ad Hoc Users Report at 27-32.

[254] See Ad Hoc Users Report at 37-38.

Respectfully submitted



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